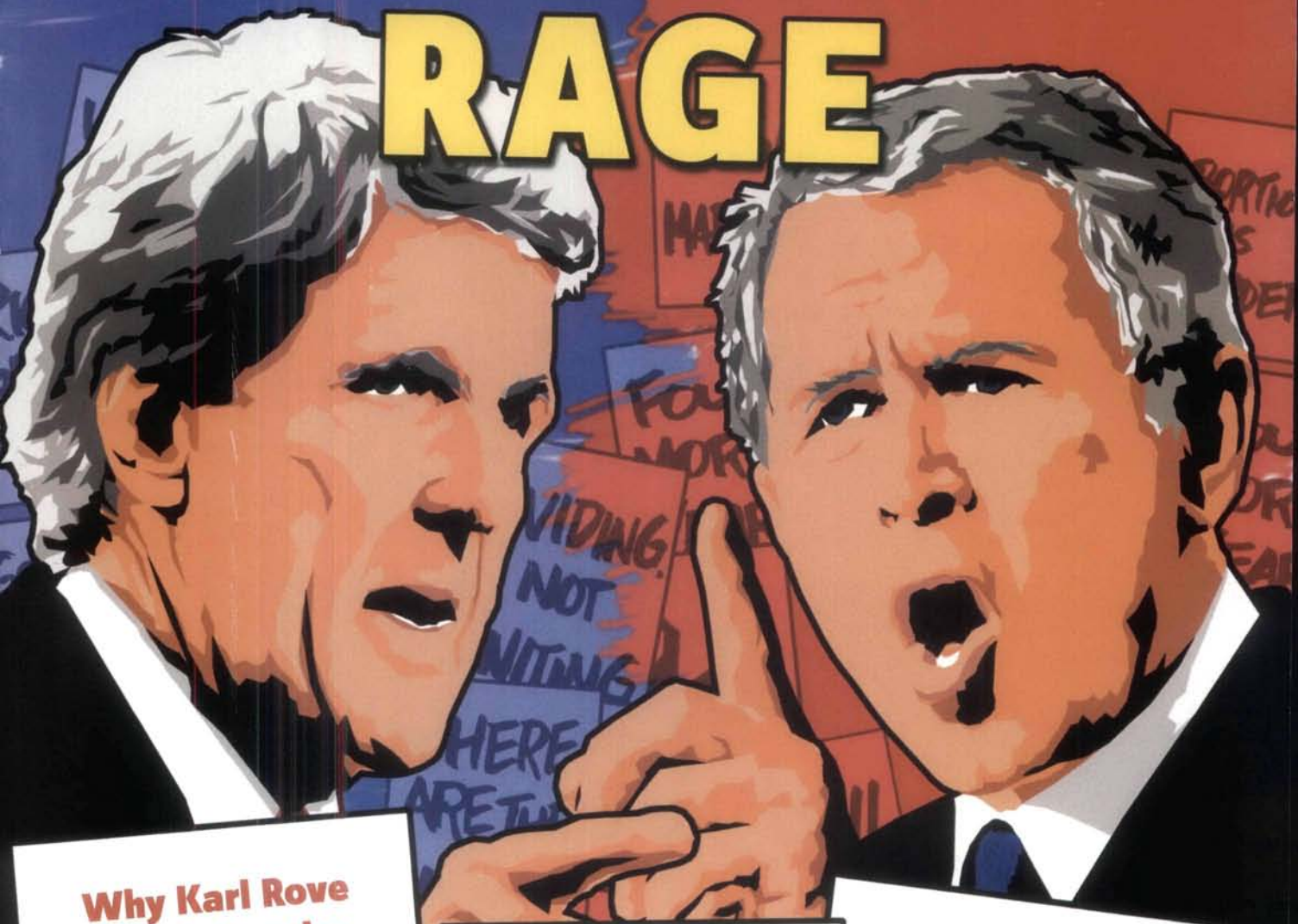
PAUL STARR: HEALTH CARE'S NEW ERA–AND THE NATION'S BIG CHOICE

THE AMERICAN PROSPECT

LIBERAL INTELLIGENCE

OCTOBER 2004

RAGE



Why Karl Rove Is Fighting the Vietnam War–Again
MICHAEL TOMASKY

Why All the Votes Won't Be Counted–Again
(URLANTZICK

Why the Networks Will Blow Election Night–Again
ROB GARVER

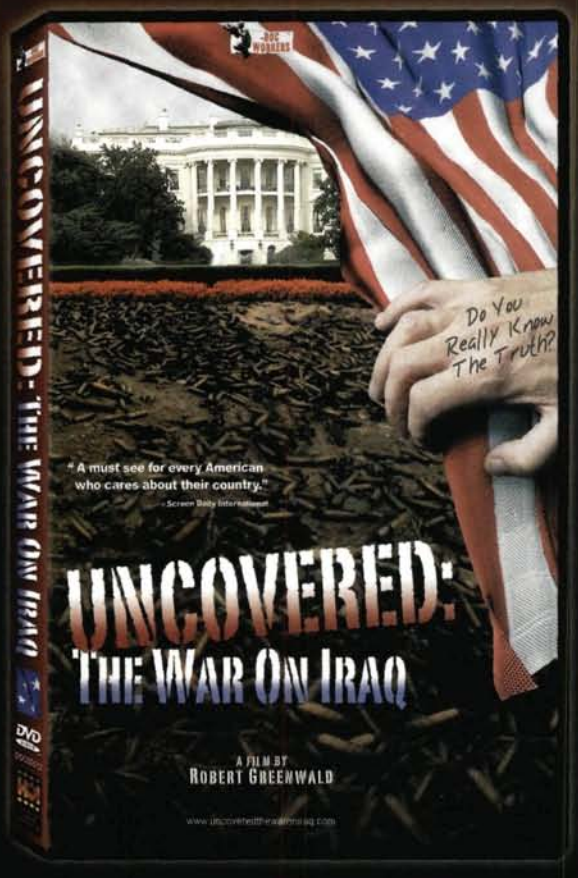
U.S. HUMAN RIGHTS: ANTHONY LEWIS, CASS R. SUNSTEIN, ANNE-MARIE SLAUGHTER, JOHN SHATTUCK, MARY ROBINSON

THE THEATRICAL HIT EVERYONE IS TALKING ABOUT IS ON DVD OCT. 19

"A sober and devastating critique of Bush's foreign policy."
- David Kehr, New York Times

"Exposes Bush's case for the Iraq war as a treasonous fraud."
- Bill Stamets, Chicago Sun Times

"This is a film every American should see, especially before we go to the voting booths...A+."
- Jim Pappas, The Trades.com



In this documentary feature, filmmaker Robert Greenwald chronicles the Bush Administration's determined quest to invade Iraq following the events of September 11, 2001.

The film deconstructs the administration's case for war through interviews with U.S. intelligence and defense officials, foreign service experts, and U.N. weapons inspectors - including a former CIA director, a former ambassador to Saudi Arabia and even President Bush's Secretary of the Army. Their analyses and conclusions are sobering, and often disturbing.

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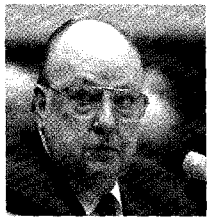

"Ailes told Congress in 2001: 'We let our viewers down. I apologize for making those bad projections that night. It will not happen again.'" PAGE 26

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The American Prospect (ISSN 1049-7285) is published monthly by The American Prospect, Inc., 2000 L Street., NW, Suite 717, Washington, DC 20036 (editorial office) and 11 Beacon Street, Suite 1120, Boston, MA 02108 (business office). Periodicals-class postage paid at Boston, MA, and additional post offices. Postmaster: Please send address changes to The American Prospect, P.O. Box 601, Mt. Morris, IL 61054-7531. Printed in the United States.

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George W. and Human Rights

In his new book, *Washington's Crossing*, historian David Hackett Fischer recounts how humane treatment of prisoners was literally invented by George Washington on the battlefield in late 1776. Official British policy was to let field commanders decide whether to put captured enemy soldiers "to the sword" or to "give quarter"—to keep captives alive in a barracks. Hence the expression "give no quarter," which literally means to kill a captive on the spot.

Washington wept, watching through a spyglass, as his troops, taken prisoner at the disastrous Battle of New York that November, were then slaughtered. After the first battle of Trenton, on December 26 and 27, where Washington's men captured several hundred Hessian mercenaries, Washington ordered his troops to treat the captives humanely. American soldiers risked their own lives, ferrying Hessian prisoners back across the Delaware. The Hessians "were amazed to be treated with decency and even kindness," Fischer writes. "American leaders resolved that the War of Independence would be conducted with respect for human rights, even of the enemy. This idea grew stronger during the campaign of 1776–77, not weaker as is commonly the case."

The United States needs human-rights standards to protect us from our own worst impulses.

In George W. Bush's 2000 acceptance speech in Philadelphia, the future president invoked the first one. "Ben Franklin was here," Bush declared, "Thomas Jefferson, and, of course, George Washington—or, as his friends called him, George W." As if.

How instructive to contrast the way the two George Ws weighed military imperatives and human decency. It made perfect sense that the British gave the American irregulars no quarter. They were viewed by the British precisely as guerrilla terrorists, who did not respect the 18th-century conventions of warfare. The very survival of the infant republic literally hinged on the battles that Washington led that dreadful winter, far more than it does on the results of interrogations at Guantanamo Bay or Abu Ghraib. But the founding George W. gave quarter.

This issue of *The American Prospect* includes a special report, produced in collaboration with the JEHT Foundation, addressing human rights, but in a particular sense: Our topic is the disparity between the human-rights goals that America commends to the world and the special exemption it too often asserts for itself. The Bush presidency reminds us that the United States needs human-rights standards more than ever, not just to bring freedom to benighted corners of the globe but to keep its own hands clean and its own citizens secure in our own democracy.

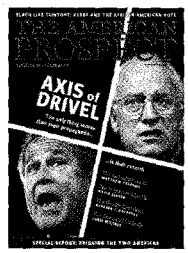
America claims to be different and special, but with an elastic, expedient definition of sovereignty. To follow this nation's rejection of treaties and agreements on criminal courts, human rights, and labor and environmental protections, you would think the United States was obsessed with sovereignty. Although no serious person thought U.S. officials would ever find themselves in the dock accused of genocide, for four decades conservatives blocked Senate ratification of the international convention prohibiting genocide, first proposed in 1948. In his dissent in last year's reversal of the Texas anti-sodomy statute, conservative Supreme Court Justice Antonin Scalia expressed indignation that his colleagues would cite evolving norms and laws beyond our shores. "This Court," he declared, "should not impose foreign moods, fads, or fashions on Americans."

And yet, in one huge area of international law—investment and trade—U.S. officials have not only welcomed infringements on U.S. domestic sovereignty but are its leading architects. Agreements like NAFTA and bodies like the World Trade Organization have subjected lawfully enacted American social, environmental, and labor regulation to review and reversal by appeals panels dominated by foreigners and unaccountable to voters, using procedures that violate American conventions of due process. When the goal is corporate, it's convenient to waive cherished sovereignty.

And on the human-rights front, the administration's lawyers actually contended that domestic law did not apply at Guantanamo Bay because it was a sovereign part of Cuba. This must have come as a hilarious surprise to Fidel Castro.

We need a single standard on human rights and on sovereignty, the same one for America and for the world, the same one for citizens and for visitors, the same one for corporations and for humans. Our current leaders shamelessly invoke every American icon, from George Washington onward, while betraying their highest principles—and ours.

—ROBERT KUTTNER



"In any other country, we'd call our political system bribery and payola; in America, we call it free speech."
—JACK E. LOHMAN
www.WiCleanElections.org

Correspondence

Characterology

WHILE I BELIEVE MATTHEW Yglesias is absolutely correct in arguing that the president of the United States must be someone of intelligence and intellectual versatility ["The Brains Thing," September 2004], I was troubled by his contention that, in most cases, character "doesn't really matter."

Regardless of what Yglesias thinks, Americans will continue to consider character as an important factor in voting decisions, meaning Democrats cannot simply wish it away as an issue. Beyond mere electoral politics, however, character is also an important factor in how a president performs his job. A candidate who lies about his past or changes positions repeatedly (such as George W. Bush) is not someone who should be trusted with the office of president. Similarly, a person who shows a lack of clarity and leadership will have a difficult time pressing important agenda items through Congress. The real issue, therefore, is not so much the irrelevance of character but the manner in which character has been misdefined by the mainstream media and the Republican Party.

True character means standing up for those who have been trampled by the wealthy and powerful and fighting against the evils of discrimination and bigotry. If the Democratic Party were wise enough to consistently emphasize this point, the American people would quickly realize that Bush is not only unintelligent; he also lacks true character.

DYLAN KEENAN
Ann Arbor, MI

Follow the Money

DAVID SIROTA PERFECTLY outlines the costs imposed on society by our moneyed political system ["The Big Squeeze," September]. While the symptoms are obvious (high taxes; low wages; exorbitant drug, health-care, and energy costs), the cure is more elusive. Taxpayers want politicians to act in their best interests even while politicians take money from special interests that want just the opposite. What part of "he who pays the piper calls the tune" do we not understand? Our current system virtually demands this conflict of interest, and lawmakers love it because it ensures their re-election.

If Congress is to be beholden to its funders, let it be to the taxpayers. That can only be the case, however, with full public funding of political campaigns, as it is in Arizona and Maine (which are both voluntary and thus pass constitutional muster). Just $5 per taxpayer per year at the state level would save taxpayers more than $1,000 per year in special-interest subsidies (though it varies with each state). The numbers are twice that at the federal level (See www.azclean.org, 2002 Success).

Only when we get private money out of the public electoral system will politicians vote in the best interest of the public. Low taxes and balanced budgets will then become the norm. In any other country, we'd call our political system bribery and payola; in America, we call it free speech. In private industry, we fire people who take bribes and then act against the shareholder's best interests; in American politics, we re-elect them. Where are our heads?

JACK E. LOHMAN
Executive Director, www.WiCleanElections.org

Americana Re-Examined

THE AMERICAN PROSPECT uses Norman Rockwell's famous painting *Freedom from Want* in Deepak Bhargava's "How Much Is Enough?" [September] to show abundance in action. However, much to the point of the article, it also shows the hard times for those who do the real work of our society. Here is grandma, bringing in what is obviously a 25-pound pterodactyl of a turkey. Grandpa, the klutz, stands right next to the table instead of stepping back, forcing grandma to hold the beast way out to her right. Is she a weight lifter or something? There also isn't enough room on the table to set it down. Meanwhile, at least seven out of the eight guests are able-bodied enough to help grandma. Instead, they ignore her, turn away, and talk to one another. It figures.

Rockwell was a most worthy gentleman, but I guess he didn't run too many dinners.

JOHN E. ULLMANN
Professor Emeritus, Frank G. Zarb School of Business, Hofstra University, Hempstead, NY

All Too Familiar

"FOLLOW THE (SAUDI) Money" by Noy Thrupkaew [August], concerning "terrorism" in Cambodia, threw a sober, one might even say somber, light on a situation that is becoming all too commonplace. It seems that the Cambodian government arrested some "terrorists" and has been holding them in prison for well over a year with no charges filed against them. If one substitutes the U.S. government and Guantanamo Bay, Abu Ghraib, and the other hush-hush prisons we've established in foreign countries,

doesn't this situation sound familiar?

It would appear that Amnesty International has every right to be concerned about the case's "irregularities." When a Phnom Penh judge says a lot of evidence is lacking, even after more than a year, it only reinforces the impression that the arrests were either politically or religiously motivated, and the Cambodian government still hasn't been able to put together enough evidence to substantiate a charge of terrorism. Appealing to the United States to provide documentation has the appearance of asking us to manufacture the evidence for them. This administration certainly wouldn't do a thing like that, would it?

Thrupkaew's quote of a statement made by David Wright-Neville, an Australian expert on Southeast Asian terrorism, was particularly ironic. "Cambodia," he says, "is a place where surveillance groups are involved in doing the regime's bidding." Isn't that exactly how the United States is operating?

PATRICIA M. KOSTER
Williston, FL

Just Wondering

I WAS MOST IMPRESSED BY Clay Risen's essay concerning executive orders, "The Power of the Pen" [August]. I have an expansive suggestion.

The two most disastrous laws that Congress has passed since the Bush administration came to power are the tax cuts and the Medicare prescription-drug "benefit," which most senior citizens shun, recognizing that the real purpose of the law is to use taxpayer dollars to subsidize the pharmaceutical companies. My question, therefore, is whether it would be theoretically possible for John Kerry (assuming he wins this November) to sign two executive orders shortly after he takes office. One would negate all the Bush tax cuts and bring the tax laws back to exactly where they were on January 2001; the other would negate the (unwanted) Medicare drug law in its entirety.

Don't "reform" and improve a terrible law. Get rid of it completely.

C.D. WELLMAN
Seabury, NY

Clarification: In "The Health-Care Scam" by Barbara T. Dreyfuss from our September issue, the author characterized Liz Fowler as a conservative Republican. In fact, Fowler is a Democrat.

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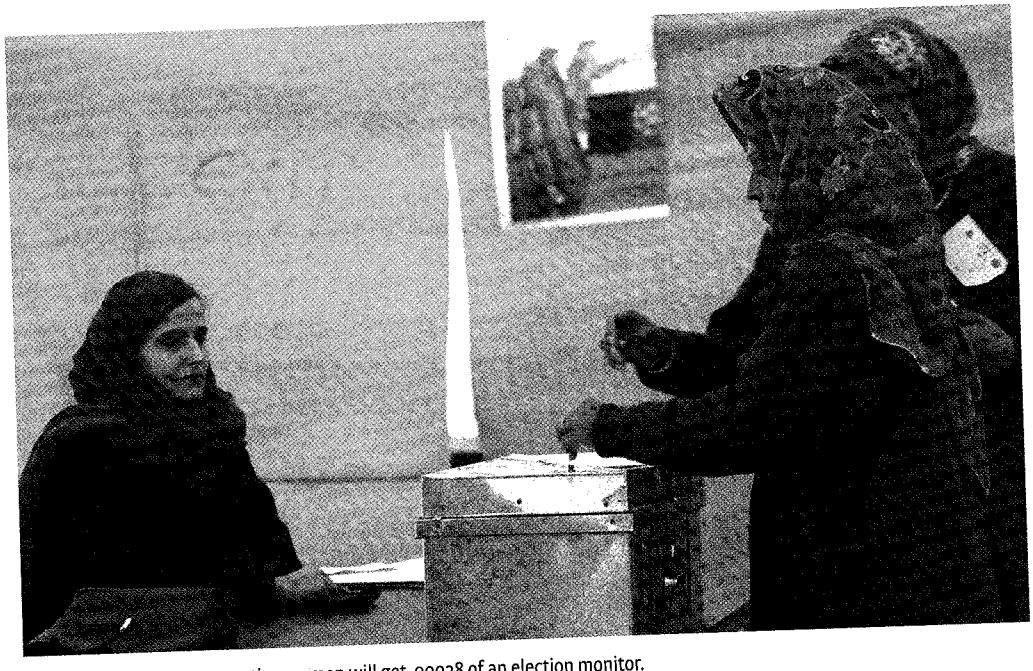
Devil in the



Kabul Market: These two voting women will get .00028 of an election monitor.

Minimal Monitors

THOROUGH ELECTION MONitoring is a staple in countries recovering from long periods of civil strife. In post-conflict zones such as Bosnia, East Timor, and Haiti, large numbers of foreign experts and trained local monitors have been instrumental in granting legitimacy to the election results, thereby helping those nations' transition to democracy.

But not in Afghanistan. On October 9, as Afghans take to the polls in their country's first presidential election since the Taliban's ouster in 2001, not a single foreign monitoring body will have a significant presence in the country. The European Union and other intergovernmental organizations with experience monitoring elections in post-conflict areas once had high hopes for robust monitoring in Afghanistan. Increasing violence and attacks on foreign aid workers, however, have since forced the EU and others to scale back their commitments.

In fact, as of mid-September, the only nationwide election monitoring is to be conducted by the Free and Fair Elections Foundation for Afghanistan (FEFA), a group of Afghans trained by the Washington-based National Democratic Institute (NDI) and funded by the U.S. Agency for International Development. The FEFA's monitors number around 1,400— a paltry figure compared to the 10.5 million Afghans who have registered to vote. The ratio of election monitors to voters in Afghanistan comes to one monitor for every 7,142 voters. In East Timor the ratio was one monitor for every 444 voters.

Of course, the sparse election monitoring is a direct consequence of the dire security situation throughout Afghanistan. Nearly 1,000 people have been killed in political violence there in the last year, and the Taliban and al-Qaeda remnants have pledged to disrupt the October elections. According to a report by the NDI, in some regions the Taliban are reportedly distributing fliers proclaiming that those who vote will be killed.

Few blame the intergovernmental organizations for their reluctance to put a significant number of monitors on the ground this October; no one wants to see foreign aid workers killed. Rather, many in the aid community question the timing of these elections as such. As Andrew Wilder, head of the Afghan Research and Evaluation Unit, a Kabul-based nongovernmental organization, told Agence France Presse in September, "If it is too dangerous for monitors to monitor, isn't it too dangerous for Afghans to vote?"

—MARK GOLDBERG

525, 526, 527...

IF GEORGE W. BUSH TRULY believes that "shadowy 527" groups (independent campaign organizations established under Section 527 of the tax code) are "bad for the system," the

Details

"The president inherited a Clinton recesssion and turned it into the early stages of Bush prosperity."
—Secretary of Commerce **DONALD EVANS**

last few weeks must have driven him batty. New 527s are forming at a rate of 30 to 40 a week; in the two weeks after Bush called on John McCain to join in legal action against the whole mess of them, 84 new groups filed with the IRS, up from 75 in the preceding two weeks.

But there may not be nearly as many 527-ers as there are 527s. One of the keys to a successful shadowy 527 campaign can be the construction of multiple parallel organizations. Establishing several organizations, says Democracy 21's Fred Wertheimer, can have distinct advantages: It can help groups "get around existing contribution limits" and "make it more complicated for the media and the public to keep track of what is going on."

In Washington state, for example, business interests are so up in arms about Democratic state attorney-general candidate Deborah Senn that one 527, the Voters Education Committee (VEC), spent $585,000 on ads opposing her even before the Democratic primary was held. The VEC's director, Bruce Boram, who's also co-chair of Voters for Legislative Action, filed the same day as the VEC; he additionally directs a political action committee called United for Washington, which has in the past funded attack ads by People for Honorable Representation, another Boram 527. Asked about the goals of, say, Voters for Legislative Action, Boram conceded, "I don't remember. ... I have a lot of these."

Similar 527 cloning is also under way in Nevada, where the industrious Chrissie Hastie, controller of the state Republican Party, filed three 527s in just 24 minutes on September 5. One of these groups, Citizens for Fair Taxation, has already made a splash attacking sitting state Senator Ann O'Connell, a Republican. Neither Hastie nor the Nevada GOP could be reached for comment as to the propriety of a Republican official attacking a Republican candidate through the kind of vehicle denounced by our, yes, Republican president.

And as for the 527 with the Orwellian name that sparked the recent news blaze, Swift Boat Veterans for Truth, it's inspired a wide range of knockoff "Truth" squads, from its sibling organization Vietnam Vets for the Truth to anti-Bush Texans for Truth, not to mention Coal Miners for Truth, founded by Scott Pullins—one of at least four Pullins 527s in Ohio.

—JEFFREY DUBNER

Will Unions Exist?

AMONG THE ISSUES TO BE determined by the upcoming presidential election, there's the little item of the right of workers to secure a union. As things now stand, the Bush-appointed majority on the National Labor Relations Board (NLRB) may just relegate that right to history's dustbin.

Currently pending before the NLRB are two cases that deal with the validity of "card check" recognition. Under card check, employers agree to recognize a union if a majority of their employees sign pledge cards indicating their support for the union. It's the method through which the Service Employees International Union (SEIU) has organized janitors over the past

WHILE YOU WERE SLEEPING

It wasn't the oil, it wasn't the neocons, and it wasn't a dream of democratic transformation throughout the Middle East. It turns out that the decision to invade Iraq may have been based on a simple case of mistaken identity.

As Donald Rumsfeld made clear in a commemorative speech on September 10, our defense secretary still can't tell Saddam Hussein and Osama bin Laden apart. Just before the September 11 attacks, he recalled, "[T]he leader of the opposition Northern Alliance, [Ahmed Shah] Massoud, lay dead, his murder ordered by Saddam Hussein, by Osama bin Laden, the Taliban's co-conspirator." In fact, Hussein had nothing to do with it, though bin Laden certainly assisted in the plot.

Later in the speech, Rumsfeld elaborated on this theme. "Saddam Hussein," he said, "if he's alive, is spending a whale of a lot of time trying to not get caught." Hussein, of course, is most certainly alive, already was caught, and is currently on trial for war crimes in Iraq. Bin Laden, on the other hand, may be dead, and if he is alive we don't know where he is, but he's probably trying pretty hard not to get caught.

Continuing to warm to this theme, Rumsfeld plowed ahead. "We've not seen [Hussein] on a video since 2001," he declared. But Hussein was making videos well into 2003, and we saw footage of him on television when he was caught. Rumsfeld even bragged about it at the time.

The confusion is a bit hard to understand seeing as the two men don't particularly resemble each other (one is short, with a moustache; the other tall, with a beard, etc.), but it would explain a great deal—like why more than 100,000 troops are in Iraq and not a one is in Pakistan looking for bin Laden, America's most dangerous adversary.

—Matthew Yglesias

BRAVE NEW WORDS

FLIP-FLOP Something John Kerry does. Not to be confused with **BOLD LEADERSHIP**, which is the way to characterize George W. Bush's reversals when he opposed the creation of a 9-11 commission, then decided to appoint one, then opposed its recommendations, then decided to adopt them.

UNEMPLOYMENT A misleading and unduly gloomy index of the nation's economic condition, as Dick Cheney explained on September 9, because the official statistics miss the fact that "400,000 people make some money trading on eBay."

15 years, through which the Hotel Employees and Restaurant Employees (HERE) organized the Vegas strip, and through which the United Auto Workers (UAW) organized parts manufacturers. Indeed, there are precious few examples of unions winning private-sector recognition in the past decade by any method other than card check.

Until innovative unions began insisting on card-check recognition, labor relied almost entirely on elections supervised by the NLRB. But over the past four decades, employers have routinely manipulated those elections to thwart their workers' pro-union desires. As Cornell professor Kate Bronfenbrenner has documented, employers routinely threaten workers during organizing drives with plant closings and firings—indeed, 5 percent of workers involved in such drives are fired, an act that is totally illegal but for which the penalty to employers is negligible. Though polling has shown that more than 40 percent of workers in nonunion workplaces would like to join unions, the rate of private-sector unionization is now an anemic 8 percent—in large part because companies have been so successful at rigging the NLRB process to their advantage.

In June, however, the three-member Bush-appointed majority on the five-member NLRB voted to hear two cases, backed by the anti-union National Right to Work Foundation, that challenge card-check agreements reached by the UAW with parts manufacturers. Much of the mischief that the Bush administration has accomplished has transpired in the relative obscurity of regulatory rulings, but a backroom decision to ban the primary means by which workers can obtain union representation is a bit much even for the Bush presidency.

For his part, John Kerry supports legislation that would make card check mandatory. So just in case you didn't think a lot was riding on this election, add the continued existence of unions in America to the list.

—HAROLD MEYERSON

Gitmo Justice

TO THE RELIEF OF MOST OF civilization, the Supreme Court ruled in June that the United States has an obligation to grant the roughly 585 detainees held at Guantanamo Bay (aka Gitmo) an opportunity to challenge their status before a "neutral decision maker." Since then, casual news observers may have perceived an uptick in government efforts to implement such judicial proceedings. Closer observers may have detected just how fraudulent those efforts really are.

There was, for one, the inauspicious debut in late August of the military commission's process for criminal trials at Gitmo. Authorized by the president in 2001, the slapdash system took nearly three years to produce actual charges against any detainees (four have been charged with relatively low-level offenses, with several more set to be charged this fall). According to human-rights officials allowed to observe this first week of proceedings, the blatantly ad hoc process unfolded over four days of near Keystone Cop chaos.

"We had a number of problems with the process as it was set up," says Amnesty International's Jumana Musa, one of the observers. "And having it play out in action really magnified problems even beyond what we were expecting." Defense attorneys complained of understaffing and lack of resources. Problems with the translation system were chronic. Of the commission panel's five members, only the presiding officer, Colonel Peter Brownback, had any legal training. According to Musa, Brownback had to explain basic legal terminology to his fellow panelists—"things like what is 'jurisdiction,' what is 'lead counsel.'" One alternate on the panel helpfully admitted under defense questioning that he didn't know what the Geneva Conventions are.

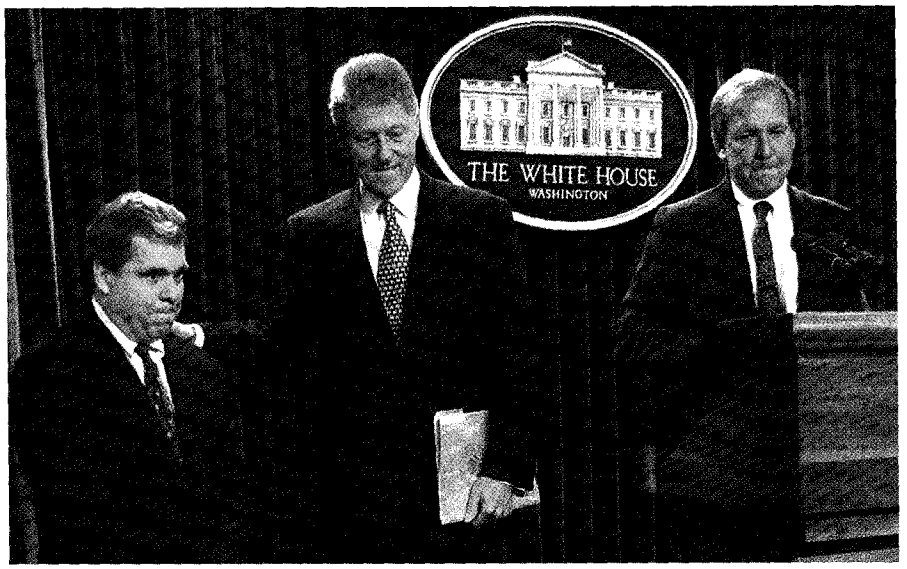
This lack of rudimentary understanding of the laws of war was hardly the panel's only shortcoming. Several panelists had combat experience in the same Afghan theater from which the detainees were plucked, and alternate panel member Lieutenant Colonel Curt S. Cooper admitted that he had referred to all Gitmo prisoners as "terrorists." At one point, a defense attorney confronted Brownback with a taped record of statements that just moments before he had denied ever having made.

The spectacle of the commission's opening week only served to overshadow an even more troubling development: namely, the new system of Commission Status Review Tribunals (CSRTs), the judicial innovation the administration came up with to satisfy the Supreme Court's June rulings. (All 585 detainees are set to go through CSRTs; 55 of those proceedings have been completed since they began on July 30.) To Human Rights Watch's Sam Zia-Zariffi, these tribunals "are the more problematic ones. There is no defense counsel, an almost nonexistent right to call any witnesses, and no ability to challenge the evidence brought against you." There are also no bars to admitting evidence obtained through coercion.

Ah, but don't worry, Navy Secretary Gordon England assured the press on September 8, saying, "The process is doing what we asked the process to do." Maybe that's the problem.

—SAM ROSENFELD

Dispatches



Trouble Shooters: Lockhart (*left*) and McCurry helped save Clinton during impeachment. Now comes Job No. 2.

The A-Team

After six weeks of battering, John Kerry learned the importance of a tough and experienced communications operation. But did he learn it in time?

BY GARANCE FRANKE-RUTA

UNLESS YOU SPENT THE SUMMER ORbiting with the Genesis space capsule, you know that John Kerry had a lousy August and a brutal early September. Thanks to the attacks of the Swift Boat Veterans for Truth and the masterfully orchestrated Republican national convention—aided and abetted by the right-wing media's power to keep stories alive beyond their sell-by date—Kerry's unfavorable ratings shot skyward, while George W. Bush regained all the ground he'd lost over the summer and spring.

But Kerry's problems weren't all of the Republicans' making. Throughout the late summer, his communications operation was slow to respond to attacks—and to seize opportunities to play offense. When Bush said of the war on terrorism, on the day the Republican convention was to open, "I don't think you can win it," Kerry, Democratic strategists say, should have responded more forcefully. "Someone needed to be out there and say [to Kerry], 'I know you're tired, but the president just said we can't win the war on terror,'" says one Democratic communications professional. Instead, Kerry stayed silent and stayed on vacation on Nantucket—where he was photographed windsurfing in floral shorts. By the next day, the opportunity—like so many for Kerry—was lost; Bush had reversed himself and the media's attention was now absorbed by Rudy Giuliani's attacks on Kerry, and, later that evening, by Arnold Schwarzenegger's taunt of "girlie men."

That's a pattern the campaign is determined to reverse. Already, new, more aggressive communications advisers helped Kerry turn a mysterious explosion in North Korea into a front-page *New York Times* story, framing Bush's response to nuclear proliferation by having their candidate call a *Times* reporter and give him exclusive quotes on the subject. For months, political analysts have said that the outcome of campaign 2004 would turn on external events. But as the campaign heads into the homestretch, it seems just as likely that it will turn on the skills of the campaigns' internal advisers.

A CAMPAIGN'S COMMUNICATIONS OPeration is its most vital. All the policy making and idea generating in the world won't make a difference if a candidate can't formulate—and defend—a compelling narrative about himself (and an unflattering one about his opponent). George Stephanopoulos held the vital campaign post of communications director for Bill Clinton's winning 1992 bid, famously setting up a war room in summer 1992 to shake off the ghosts of the slow-to-respond Michael Dukakis campaign of '88. Voters would see "we weren't like Democrats in the past," Stephanopoulos told *Frontline* in 2001, reflecting on the early days of the campaign. "They'd see that we were different—not only because we were different on our ideas but because we fight back when we're hit."

The memory of the Clinton war room hangs like a cloud over a campaign that dithered as the Swift Boat Veterans for Truth smeared Kerry. But Kerry has since revamped his communications op-

eration, bringing in veterans Joe Lockhart, John Sasso, and Mike McCurry—the A-Team—in an effort to fight back when he's hit.

The shuffling of Kerry's communications team dates to 2003, and began, then as now, out of necessity. Kerry, trailing badly, ousted campaign manager Jim Jordan that September, which was followed shortly thereafter by the departure of campaign spokesman Robert Gibbs. To replace Jordan, Kerry brought in Mary Beth Cahill, the no-nonsense chief of staff to Senator Edward Kennedy. Cahill whipped the Kerry team into shape, focusing it like a laser on winning the contest in Iowa. And Cahill filled the campaign with her own team of Massachusetts operatives and friends from Capitol Hill, including former Kennedy communications director Stephanie Cutter to do the same for Kerry. Everything during primary season went according to plan, and the team emerged victorious to find an unusually unified party base, an outpouring of Democratic hard money, and a troubled incumbent President Bush.

Cahill brought on even more Capitol Hill veterans in key positions after the primaries ended. There was just one problem: Many of these people, like Cutter and Cahill herself, had never worked on a presidential campaign before. The problem was particularly acute in the campaign's communications operation, where members of the press noticed as early as April that things weren't running very smoothly. Cutter, in fairness, was overworked, charged with overseeing message as it related to everything from speechwriting to scheduling, in addition to being a spokeswoman. But experience was lacking. "No presidential campaign-level press secretary has been within 500 miles of Stephanie Cutter's office, until now," snarked one Democratic insider after the shake-up.

Kerry was not unaware of the problems, and he expanded and altered the communications team over the spring and summer. He brought Cutter on the road with him and added former Democratic National Committee communications director Debra DeShong in June, plus Miles Lackey, John Edwards' former Senate chief of staff, who became Kerry's deputy campaign manager for policy and speechwriting. The slow-motion reorganization also brought on former Clinton speechwriter Terry Edmunds to replace previous speechwriting head Andrei Cherney, a former Al Gore staffer. Meanwhile, newcomers Phil Singer and Chad Clanton, the latter a protégé of James Carville and Paul Begala, took on active roles as campaign spokesmen. The team seemed to be jelling, and Kerry was leading in many polls.

"The American people hate a bully," one Democratic insider says. "But you know who they hate even more? The guy who won't fight back." Now, maybe Kerry will.

Then came August. According to Democratic insiders, a number of Kerry's most essential senior staffers advised him against responding to the "Swift"-boat attacks. Kerry's instincts told him to respond. But, according to one insider, Cahill, Cutter, communications research whiz David Ginsberg, and pollster Mark Mellman all advised against responding out of concern for alienating swing voters in battleground states, who, polling data showed, were turned off by negative campaigning. So Kerry sat on his hands until steam started coming out of his ears.

And that's when Kerry finally brought on the A-Team. "This wasn't a coup. It wasn't a group of people who showed up one day and suddenly were in charge," says an observer. "These people showed up at the Kerry campaign and took power because John Kerry wanted them to."

Though much has been made of the Clinton connections of the new team, not all of these men are, in fact, Clintonistas. The Clintonistas were ideological proponents of "third way" politics; the A-Team's major unifying experience is that its members are seasoned political veterans, often known for their bare-knuckle, take-no-prisoners campaigning. Washington Democratic insiders and operatives have cheered their arrival, and their record of experience with presidential contests.

Lockhart has worked on every Democratic presidential general-election campaign since 1980, in addition to serving as Clinton's White House press secretary during the impeachment trial—perhaps the nastiest moment in partisan politics until today. And McCurry was Clinton's spokesman for three years, including the first several months of the Monica Lewinsky scandal.

Joel Johnson, a former senior adviser to Clinton, was installed as the campaign's new director of rapid response (the war room). Sasso was brought on board to be a traveling strategist on the plane with Kerry, the role Bruce Lindsay played for Clinton. Clinton pollster Stanley B. Greenberg, who dropped his work with other groups in order to advise the Kerry campaign, was brought in not for the more populist line he often espouses but for his reputation as a more aggressive fighter.

Michael Whouley, newly ensconced at the Democratic National Committee (DNC), has his own impressive track record: turning around Gore's flagging primary campaign in Iowa and then doing it again for Kerry. (Whouley ran field operations for Gore.) Howard Wolfson is now adding punch to the DNC as well; he ran Hillary Clinton's war room in the tense autumn months of her 2000 Senate race. Clinton advisers Carville and Begala, meanwhile, will also play greater roles.

Kerry's pattern as a campaigner has consistently been to bring tougher strategists on board as the going gets tougher. At least, that's what Democratic insiders are banking on. "The American people hate a bully," one recently told me. "But you know who they hate more? The guy who won't fight back. Lockhart understands that, Sasso understands that, and they told Kerry what he intuitively understood: He should have responded [to the Swift-boat attacks] with a shock-and-awe counterattack, but he didn't."

With the new team in place, perhaps that's a lesson he's finally learned. ■

Buckeye Blues

Ohio has 19 percent of the nation's lost jobs since Bush took office. So why is Kerry in trouble there? Because the state has lost something else, too.

BY HAROLD MEYERSON

LORAIN, OHIO—THE STEELWORKERS hall here is a musty monument to American labor's glorious past. On the walls are photos of Franklin Roosevelt signing the Wagner Act in 1935, and of Philip Murray, president of the United Steelworkers of America from its inception in 1937 until his death in 1952. Newer images are nowhere to be found, and the hall itself, while functional, is cheerless and stark.

And what's to cheer? In this corner of northern Ohio, about 40 miles west of Cleveland, the factories that once employed thousands of workers are almost entirely gone. On an August afternoon, I'm meeting with union leaders from across Lorain County, each with his own mournful numbers. Tim Donovan, president of the United Auto Workers local that represents the local Ford plants, says that they now employ 2,100 workers, down from 10,000 a decade ago. The Steelworkers local represented the workers at a United States Steel plant that employed 20,000 in the 1970s; today, that workforce has shrunk to 1,400.

The meeting itself is not downhearted. The two dozen leaders talk about the unions' political program in Ohio, the most extensive labor has ever mounted. The program in Cleveland, everyone agrees, has never had so many union activists reaching so many of their fellow members so early or often in the Democratic cause. Still, the leaders' is a tempered enthusiasm. "Is [John] Kerry getting his message out?" one worries. "Every time he opens his mouth, the Republicans call it a lie." "They're really hitting hard on this whole gay-marriage, homosexual thing," says another. Their unanimous recommendation is that Kerry stick to bread and butter. "He really needs to stress health care," says one. "They say, 'How do we fund this?' I say, 'How did we fund this war that nobody wants?'"

Polling shows that Ohioans, whatever their initial position on the Iraq War, now see it as a drain on resources that could be used in Ohio—a state that has 4 percent of the United States' population but, notes Lorain-area Representative and progressive Democrat Sherrod Brown, 19 percent of the nation's jobs lost during the presidency of George W. Bush.

This is the kind of point that union political programs are good at hammering home. Since the birth of exit polling in the 1960s, union households have invariably been found to vote between 9 percent and 12 percent more Democratic than nonunion households. That margin has always been wider among white males, among whom union members have been roughly 20 percent more likely than their nonunion counterparts to vote for Democratic presidential nominees.

Which is why the decline in union membership makes much of the industrial Midwest such a challenge for Kerry in a year when Bush's indifferent economic stewardship should make those states easy pickings. "People think we're a big union state, but we're not anymore," says Paul Ryder, a senior staffer for Ohio Citizen Action, from his office in downtown Cleveland that looks out over what seems like miles of abandoned steel mills. Just 18 percent of the Ohio workforce is unionized, and its four largest unions are in the service and retail sectors, not manufacturing.

And yet Ohio has not made the transition to a postindustrial economy. The percentage of college-educated Ohioans lags behind the national average; white working-class voters still constitute slightly more than 60 percent of the total

electorate in Ohio and Pennsylvania. Indeed, the two fundamental transitions—one socioeconomic, one demographic—that are turning some states more Democratic are nowhere to be found in the heart of the Rust Belt. The socioeconomic transition is the rise of vibrant, postindustrial metropolitan areas whose populations tend to be socially liberal; the demographic one, the explosive growth of the economically liberal Hispanic population. Such transitions are behind the conversion of California from Nixon-and-Reagan Land to the most Democratic of states. They are the reason why the Southwest is in play this November. They are why Florida is trending Democratic: The state's Hispanic population increased from 12 percent to 17 percent of the state during the '90s.

Not so in Ohio. Because the state is not creating postindustrial jobs, its brighter and more ambitious young people tend to leave. And because the state is not creating any jobs, virtually no new immigrants end up there. Hispanics constituted just 1.9 percent of the Ohio population in the 2000 census; they were 12.5 percent nationwide. Ohio was 84-percent white in that census; the United States was just 69-percent white. (Indeed, one can imagine a long-term transition in which Florida and even Texas become increasingly nonwhite Democratic strongholds, while Ohio, Pennsylvania, and West Virginia become more Republican.)

When Republican strategists look to Ohio, then, they see an economically and educationally lagging, increasingly nonunion white working class. In short, they see the South. Ohio whites may not be as conservative as their southern counterparts, but they don't have to be, because the (heavily Democratic) black share of the population is correspondingly smaller than it is in Dixie.

The small towns of southern Ohio are close to southern to begin with, an extension of Appalachia north of the Ohio River. The Bush campaign is organizing heavily there and throughout rural Ohio. It has managed to depict Kerry as an untrustworthy cultural alien, and, after a month of "Swift"-boat and Republican-convention mendacity, Bush has taken a narrow statewide lead.

Against this onslaught the Democrats have erected a phenomenal organization, and are hoping that Kerry is able to reach voters with the right message. Into the void created by the demise of industrial unions and the decade-long collapse of the state Democratic Party, America Coming Together (ACT)—the largest of the Democratic "527s"—is spending a breathtaking $15 million for its statewide voter-mobilization effort.

On the day after my meeting in Lorain, I spend the afternoon walking the sidewalks of Canton, where the old Republic Steel mill is long gone, and where newer layoffs at Timkin, Rubbermaid, and Diebold are convulsing the economy. I'm with Canton ACT's two lead organizers, Dave Leasure, who used to work at Republic, and Sean McDonald, who worked at a local carpet store until it went under. By mid-August, they and their co-workers had contacted 18,000 Canton voters; statewide, ACT had reached more than half a million. "A highly effective field program," says Ohio ACT Executive Director Steve Bouchard, "can probably deliver 3 points on election day."

On the doorsteps, Leasure and McDonald ask their neighbors which issues concern them most, then hand them a Palm Pilot, which shows one of six 20-second films on, presumably, their neighbor's designated issue. The videos say how many jobs Ohio has lost, how many Ohioans go without health care, how much money that could be going to Ohio is routed instead to Iraq. Leasure and McDonald persuade a number of sympathetic voters to fill out absentee-ballot applications, and some even to help out as volunteers. But among more conflicted voters, Kerry himself will have to close the deal.

Certainly, he will need to use the debates to convey the image of a capable commander in chief. Beyond that, with Republicans proclaiming a bond between Bush and white working-class voters on cultural issues, Kerry needs to create his own bond on economic issues.

"I always want to see a more populist message," says Brown, who notes that he carried 81 percent of the vote in heavily Catholic Lorain during the 2002

congressional election, despite his pro-abortion-rights positions. Brown opposed NAFTA and is leading the charge for affordable prescription drugs—an economic populism to which he attributes his success.

I'm sitting with Brown in Donna's Diner in downtown Elryia, one town over from Lorain. On his last visit, he says, one of the waitresses shied away from a discussion of politics. "She probably makes $18,000 a year," says Brown, "and the Democrats don't know how to talk to her. Democrats assume that workers know we're better on the economic issues than the Republicans. I don't think that many of them do. We have to talk about all those issues to her, to make crystal clear which side we're on. If we don't, she'll vote on abortion and the guys in the plants will vote their guns." ■

Iraq the Vote

This month, to prepare for next January's elections, monitors begin heading off to Iraq. Or at least to the parts of Iraq that are safe enough for elections.

BY MATTHEW YGLESIAS

THE MOST IMPORTANT ELECTION IN determining the future of U.S. policy in the Middle East may not be the one happening on November 2. Sometime in the 10 days after the victor takes the presidential oath of office on January 20, another election will take place in Iraq. This will determine the composition of a national assembly that will govern the country while writing a new, permanent constitution. A legitimate and stable outcome of that election is crucial to both Iraq and the United States. Unfortunately, it also seems increasingly unlikely.

The success of the Iraqi election is the basket in which the Bush administration has put all its eggs. Speaking at the Republican national convention, President Bush described the mission in Iraq as "clear." We are there, and in Afghanistan, to help "new leaders to train their armies, and move toward elections, and get on the path of stability and democracy as quickly as possible." The elections will be the moment, effectively, when the United States tries to relinquish its interim power once and for all. To that end, for almost a year now the United Nations team advising the Iraq Election Commission, along with several nongovernmental organizations contracted by the U.S. Agency for International Development, has been laying the groundwork for the vote: training poll watchers, conducting voter-education drives, and working out the daunting logistical issues surrounding an election in a country at war.

Now things are about to gear up. Jeff Fischer, senior adviser for elections and governance at IFES (formerly known as the International Foundation for Election Systems), one of the UN's main partners in Iraq, says that after several recent trips to Baghdad, he's "in a wrap-up process doing recruitment" to put together a larger team that will begin heading to Iraq as *The American Prospect* goes to press and in the following weeks. Fischer, a veteran of post-conflict elections in Bosnia, Kosovo, and East Timor, believes "the election process itself can create a dynamic that demonstrates to the Iraqis that there is an alternative to violence."

It's possible. The International Republican Institute (IRI), another NGO (affiliated with the GOP and dedicated to global democracy promotion) that is working on the Iraqi elections, touts on its Web site its spring poll indicating that 77 percent of Iraqis feel that "regular, fair elections" are the most important political right for the Iraqi people. This, says the IRI, is a "strong rebuttal to critics of efforts to bring democratic reform to Iraq." Military planners, meanwhile, hope that an elected government will have more legitimacy in the eyes of the Iraqi people, helping to break the cycle in which U.S. and Iraqi counterinsurgency operations lose Iraqi hearts and minds, feeding the very insurgency those efforts were designed to combat.

But such hopes have been raised before, and each time, violence has undermined the measures that were to provide a solution. After the war, reconstruction of Iraq's infrastructure and other economic aid was supposed to lower the unemployment and lessen the discontent from which the insurgency was drawing energy. Instead, America's inability to stabilize the country has rendered economic assistance ineffective, with global-development NGOs and foreign contractors scared away from projects and the bulk of U.S. funds left unspent. As of July, just 2 percent of the $18 billion appropriated the previous October had been disbursed.

Similarly, "Iraqification," the creation of trained Iraqi security forces, was supposed to take the American face off the occupation and allow Iraqis to take control of their own security. Instead, distracted by the insurgency, American troops have only partially trained these forces. Partly as a result, they have been frequently targeted by deadly attacks and have sustained far higher casualties than their American counterparts. The June 28 transfer of sovereignty, again, was meant to bolster the new regime's legitimacy in the eyes of the Iraqi public. Instead, the need to repeatedly call on U.S. forces to conduct major operations—driving Muqtada al-Sadr from Najaf, near-daily air strikes on Fallujah—has underscored the extent to which Iraq remains a country under occupation.

The outcome of the January elections isn't likely to be any different. In recent post-conflict elections in the Balkans and Southeast Asia, the United Nations, supported by international NGOs and a Security Council resolution, has run the show. Iraq, however, will technically be sovereign, leaving the UN in a mere advisory role with actual control in the hands of the very Iraqi interim government whose legitimacy the vote was designed to test.

Meanwhile, the U.S. Central Command, the only military force in the country capable of imposing order, is suggesting that it won't be able to secure key parts of the country for the election. Speaking to reporters in Baghdad on September 7, Lieutenant General Thomas Metz, the man in charge of day-to-day operations in Iraq, suggested that elections simply might not be held in rebel- or militia-controlled areas like Fallujah, Tikrit, Samara, Ramadi, and the east Baghdad slum of Sadr City. "If a piece of cancer in the country like Fallujah didn't participate, it would still ... be a legitimate election," Metz told The Associated Press.

Tell that to the residents of Fallujah. If Iraq's most discontented citizens wind up disenfranchised by the elections process, the new government will be seen as illegitimate in the eyes of the very people that process is supposed to win over. As Abdul Salam al-Qubesi of the Sunni clerics association told *The New York Times* on September 8, "We think the elections will be fake." While Metz suggests that at least some of the rebel-held areas will be retaken in time for the voting, reducing cities to rubble and then trying to win hearts and minds with elections seems unlikely to succeed.

Lieutenant General Thomas Metz has suggested that elections simply might not be held in rebel- or militia-controlled areas like Fallujah, Tikrit, and elsewhere.

Even outside insurgent-held areas, basic safety remains desperately inadequate—especially for foreigners—in ways that are also undermining the election process. Security Council Resolution 1546 passed on June 8, endorsing the transfer of sovereignty and calling for the creation of a UN protection force to safeguard election workers. So far, none has been created, as foreign governments have proven unwilling to get involved. As a result, Carina Perelli's UN elections team has been essentially limited to the Green Zone in Baghdad. "The international support will largely be focused on the headquarters operation" in the capital, says Fischer, while the election will be "an Iraqi-administered process, particularly in the field." Voter education and other preparatory work will be done by Iraqis trained by international experts in Baghdad, operating with relatively little supervision, assistance, or protection compared with previous efforts in the Balkans and elsewhere.

The resulting process will be open to fraud in areas where the interim government is strong and to violence and intimidation where it is weak. Even in Iraqi Kurdistan, which has thus far been relatively violence-free, problems loom. A recent report by the Center for Strategic and International Studies concluded, on the basis of an intensive public-opinion survey over the summer, that "after 13 years of one-party rule in the respective administrations of the Kurdistan Democratic Party (KDP) and the Patriotic Union of Kurdistan (PUK), Kurds are fed up with their regional governments." The problem is, security in those areas is currently—and, compared with the rest of Iraq, effectively—maintained by the respective militias of the KDP and the PUK, making the possibility of electoral change in the absence of international monitoring remote.

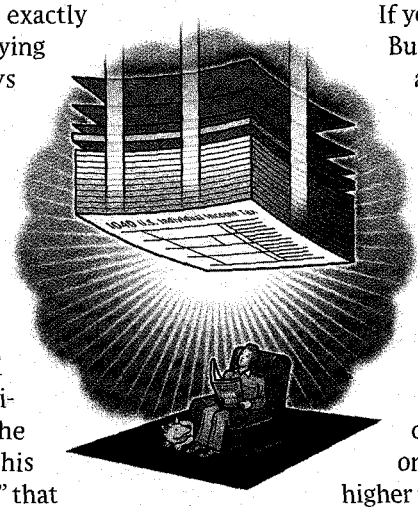
Throughout Iraq, rather than improve the situation, the elections may simply make things worse. The vote will be legitimate enough—and the United States will have invested enough credibility in its success—to make it even harder for the United States to distance itself politically or militarily from Iraq's new government. And it won't be legitimate enough—especially in the most troubled areas—to soothe anyone's discontent. Whoever loses will, justly or unjustly, feel they've been cheated out of power, and the United States will lose the one public-opinion asset it still has in Iraq: the population's yearning for elections and optimism about the future. ■

Now for Some Bad News

BY ROBERT S. McINTYRE

Read my lips: I'll raise your taxes—a lot. Thus, paraphrased only slightly, speaks George W. Bush to Middle America. Yet many of his intended middle-class victims don't seem to hold it against him. Or perhaps they haven't been listening hard enough.

In his speech at the Republican convention, Bush called for a "simpler, fairer pro-growth [tax] system" and promised to "lead a bipartisan effort to reform and simplify the federal tax code" if he's re-elected. Noble sentiments to be sure. Heck, I've devoted my career to exactly those goals. But anyone who's been paying attention knows that when Bush says "fairer," he means cutting taxes on the rich. When he says "simpler," he means cutting taxes on the rich. And when he invokes economic growth, well, he means tax cuts not just for rich people but for corporations, too.



This time around, however, Bush says that he doesn't plan to put his tax cuts for the wealthy on the national credit card. A senior administration official told *The Washington Post* after the convention that Bush will insist that his tax-overhaul plan be "revenue neutral," that is, that it will raise just as much money as current law. So inasmuch as he succeeds in cutting taxes on the rich even further, Bush promises to raise taxes on everyone else.

Bush and his aides have dropped hints about the specific kinds of tax changes he wants to pursue. Speaking at an "Ask President Bush" event in Florida in August, Bush called the replacement of most federal taxes with a national sales tax "an interesting idea that we ought to explore seriously." At another such campaign forum in Ohio in September, Bush called scrapping personal and corporate income taxes in favor of a flat-rate wage tax "certainly one option." Explaining why Bush believes that both a flat tax and a national sales tax deserve consideration, aides emphasize that the president likes that such plans would essentially make interest, dividends, profits, and capital gains tax-free.

Of course, exempting most of the income of the wealthy from taxes and dropping graduated rates in favor of a single tax rate has to be a huge cut for the rich. Because Bush promises no net revenue loss, how much more will everybody else have to pay? My organization ran the numbers on a national sales-tax bill introduced in Congress—the idea Bush found "interesting"—and found that it would saddle middle- and low-income families with average tax increases of $3,000 to $4,000 a year. We've done studies of the effects of a flat-rate wage tax, too, with similarly frightening results.

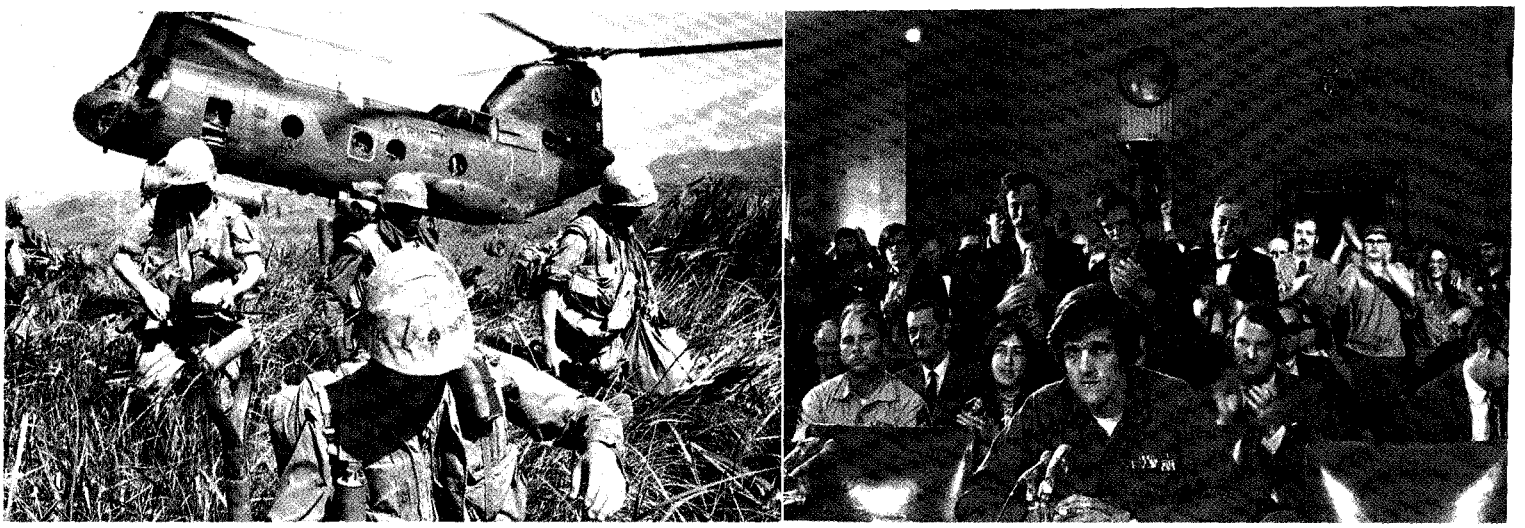
If you don't want to believe me, listen to what Bush's own Treasury Department had to say in a 2002 memo about switching to a flat-rate wage tax or sales tax. Such change "would necessarily reduce the tax burden on high-income individuals" and would be "unlikely to result in a tax as progressive as the current tax system." Or, if you'd like something even more straightforward, listen to the original authors of *The Flat Tax* (an idea later promoted less honestly by Dick Armey and Steve Forbes), who admitted: "Now for some bad news. ... [I]t is an obvious mathematical law that lower taxes on the successful will have to be made up by higher taxes on average people."

You'd think it might be a political liability to threaten to raise most people's taxes. Yet the presidential candidate most loudly charging his opponent with a plan to boost middle-class taxes is, well, Bush! At the GOP convention, Bush claimed that Kerry "is running on a platform of increasing taxes" on everyone, adding with no apparent sense of irony, "That's the kind of promise a politician usually keeps."

Bush says Kerry's budget numbers don't add up absent either higher middle-class taxes or fewer new programs than Kerry has proposed. But Kerry actually proposes only to scale back Bush's tax cuts for the very rich. In contrast, Kerry has explicitly (albeit perhaps foolishly) ruled out raising taxes on 98 percent of Americans, and says he'll curb his spending plans if necessary to meet his budget goals.

It's easy to laugh at Bush for charging Kerry with harboring a "hidden" middle-class tax-increase plan, even as Bush makes such a proposal openly. But it may be no laughing matter. The last time Bush promised an irresponsible, unfair tax program during a campaign, it was enacted. ■

ROBERT S. McINTYRE *is the director of Citizens for Tax Justice.*



Then and Now: Vietnam past, Vietnam present. The right-wing attacks on Kerry's war record were designed to suggest that he won't protect the country today.

Long Division

America is *not* split over the Vietnam War. But Karl Rove needs you to believe that it is.

BY MICHAEL TOMASKY

AROUND ABOUT THE THIRD WEEK OF THE "SWIFT"-BOAT controversy, commentators began to note, in a tone of disapproving sadness, that the firestorm created by the accusations against John Kerry proved that three decades later, the nation was still hopelessly divided over the Vietnam War. David Broder of *The Washington Post* kicked things off: "Will we ever recover from the 1960s?" his August 24 column began. He went on to reiterate some of the high-water marks of our cultural divide, noting that the "ferocity" of the clash over Kerry's war record and 1971 anti-war Senate testimony "is explainable only as the latest outburst of a battle that has been going on now for more than three decades."

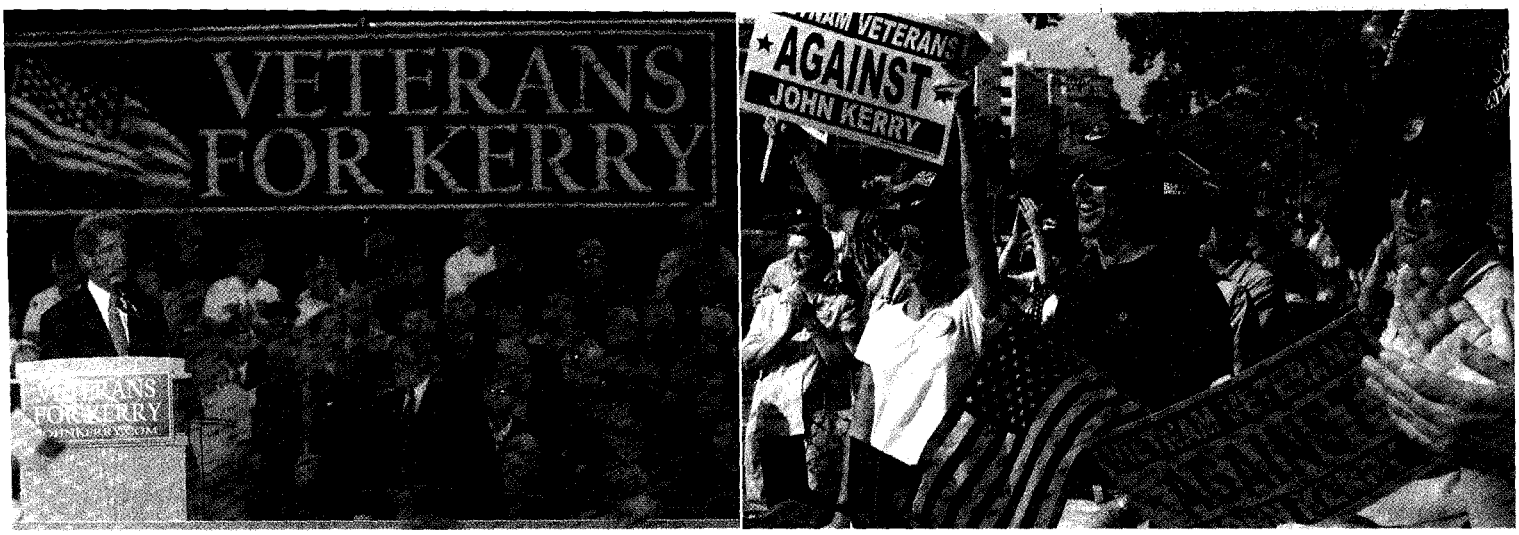
Broder's column, of course, was picked up by many newspapers around the country. Over the next few days, various second-tier newspapers trotted out their Frank Rich manqués to register similar observations. Cable-television discussions, too, fastened on to the idea. The (usually) unspoken theme of all such rhetorical interventions was clear: America remains riven by two warring interpretations of the legacy of the 1960s in general and of Vietnam in particular, and, for this regrettable state of affairs, both sides are to blame.

It's an alluring story line. And there is some truth to it. It is human nature that people cling to youth, that the world is somehow never better than it was when they were 20 or 24. Broder is completely right in his implicit suggestion that the people who came of age in the 1960s cling to their youths perhaps more tenaciously than people of other generations. And liberals of that era—who, after all, were ascendant—probably do romanticize the era more than their conservative counterparts, besotted with the memory of the power and influence over the political culture that they once had but no longer enjoy.

But the story line overlooks an important fact, a fact that the right, with an assist from an astoundingly complacent media, has successfully obscured in this campaign. And that fact is this: America is not—emphatically not—divided over Vietnam.

The Gallup Organization has taken care to track American public opinion on this question every few years since the Vietnam War ended. The results are beyond dispute. By overwhelming margins, Americans have always believed—and continue to believe—that the Vietnamese conflict was wrong. Gallup has asked two questions over the years. First, did the United States make "a mistake in sending troops to fight in Vietnam, or not"? Second, was the war (and were other wars in U.S. history) "just" or "unjust"? In both cases, the pro-war position comes up very short. Gallup began asking a version of the "mistake" question in 1965. The first majority calling the war a mistake appeared in August 1968, after the Tet Offensive and Walter Cronkite's famous anti-war editorial at the end of his newscast on the night of February 27 of that year. After the war's 1975 conclusion, Gallup has asked the question five times, in 1985, 1990, 1993, 1995, and 2000. And all five times—over that 15-year period that saw vast social change, the raging of the culture wars, and dramatic shifts to the right in American public opinion on several issues—respondents were consistent in calling the war a mistake by a margin of more than 2 to 1: by 74 percent to 22 percent in 1990, for example, and by 69 percent to 24 percent in 2000.

Similarly, vast majorities continue to call the war "unjust." While substantial majorities retrospectively support World War II (90 percent), the Korean War (61 percent), and the Gulf War (66 percent), fully 68 percent of Gallup respon-



dents in 1990 considered the Vietnam War unjust, and 25 percent thought it just. Four years later, the numbers were 71 percent to 23 percent. Only in 2004—after September 11, with American soldiers engaged in combat on two fronts, and with martial rhetoric from the incumbent administration a daily feature of national life—did the numbers change. But even then, they changed just a little: 62 percent still consider Vietnam unjust, while 33 percent defend it.

It's at least very interesting and at most rather remarkable that Americans, who tend to forgive their country pretty much everything on the matter of how it conducts its global affairs, have settled so firmly into the conviction that their nation was so wrong about something so important. Another 1995 Gallup question even found a majority of 52 percent agreeing with the assertion that the war was "fundamentally wrong and immoral," as opposed to the 43 percent who called it a "well-intentioned mistake." And while it can be argued that the 33 percent of pro-Vietnam respondents in the 2004 poll still represents a decent chunk of the population, it's also the case than in electoral terms, 33 percent constitutes a fractional minority. The similar percentage of Americans that opposed the Iraq War in the early months of 2003 was uniformly written off by the media as marginal, disgruntled, and unimportant. So public opinion on this question couldn't be clearer. There *is* no great Vietnam divide. Americans are more divided over carbohydrates than they are over Vietnam.

Public opinion could not be clearer: There *is* no great Vietnam divide, and there has not been since 1968.

But the minority, as we have recently learned, is a voluble one.

IT WAS SAID OVER THE SUMMER—MOSTLY BY RIGHT-WING commentators, but the line was parroted by many a mainstream talking head—that Kerry "opened himself up" to scrutiny of his service in Vietnam and his 1971 Senate testimony by so emphasizing the war during the Democratic convention. Again, it's a contention made with some apparent justification. I watched that Thursday night as the crewmates were paraded onto the stage, as the nominee began his speech with that too-earnest salute, and as he delivered remarks that used his service record as their leitmotif, and wondered, but what about the future? The Democrats finally had a warrior on their hands, and apparently they were going to make the most of it. (It is ironic, too, that an arena full of *Democrats* cheered wildly for the guy who shot up Charlie.)

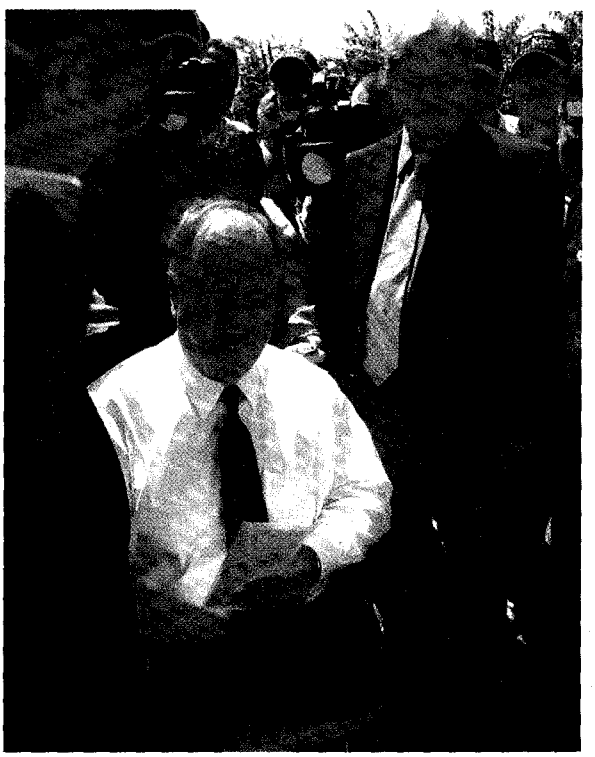
But, again, just like the story line about a nation still divided over Vietnam, this criticism of Kerry is fundamentally at odds with the facts. The Swift Boat Veterans for Truth began organizing themselves long before the Democratic convention. In *Salon*, Joe Conason reported that John O'Neill, the group's most public member, first approached Dallas-based public-relations consultant Merrie Spaeth in late 2003 or early 2004. At that juncture, Spaeth turned O'Neill away, saying that "he sounded like a crazed extremist" and advising him to "button his lip" and stay out of the limelight.

(Spaeth has a fascinating history of her own. Her participation in the 2000 Bush campaign's smearing of John McCain, which included a particularly despicable charge that he cooperated with the Viet Cong while held as a prisoner of war, and her work for Kenneth Starr in 1998 are now well-known. Less so is the fact that she was, arguably, present at the creation of conservative talk radio, when New York station WMCA-AM, which at one time had had the joyful task of introducing New York teens to the Beatles and the Stones, switched to a conservative-leaning talk format in the mid-1970s, with Spaeth as one of its hosts. Before that, and to my eternal chagrin, she played a charming adolescent in George Roy Hill's rich and touching 1964 film, *The World of Henry Orient*, in which her character encouraged her pre-teen coeval's schoolgirl crush on a famous concert pianist, Orient. In other words, she played the enabler of a fantasist.)

What changed, between that winter and this past May, when Spaeth arranged the Washington press conference at which the Swift-boat group unveiled itself? Between the time when Roy Hoffman, less well-known than O'Neill but every bit as central to the Swift-boat group's formation, went from praising Kerry as "a good man" in 2003 to playing a lead role in the attacks? One thing that changed was that Kerry went from being an also-ran to being the putative nominee. And other things may have. All parties swear that there were no conversations between anyone associated with the Swift-

boat group and presidential adviser Karl Rove (or anyone in the White House or on the Bush campaign). No one has been able to prove any such links, and, of course, it's unlikely that anyone ever will. But the attacks on Kerry, to any student of Rove's way of doing things, look awfully familiar.

In 1985, write James Moore and Wayne Slater in their biography of Rove, *Bush's Brain*, Rove sat down and wrote a strategy memo for Bill Clements, who had been the first Republican in a century to be elected governor of Texas before losing his re-election bid. Rove suggested ways of softening Clements' image; then, he quoted Napoleon: "The whole art of war consists in a well-reasoned and extremely circumspect defensive, followed by rapid and audacious attack." He highlighted the last phrase for emphasis. Later, when Clements was running (successfully) against Democrat Mark White, Rove wrote that "anti-White messages are more important than positive Clements messages. Attack. Attack. Attack." The modus operandi was simple and admittedly inventive: Identify the opponent's strength, not his weakness; attack the strength, turning a story line that was once clear into a muddle of unprovables; make the election a referendum on the other person's "character." If the savaging could be tied to certain hot-button issues, so much the better. It's an MO that John McCain knows all too well—or used to.



To the Max: The GOP smears of Cleland in 2002 hit a new low.

Incidentally, on the topic of Rove and the Vietnam War, Moore and Slater report that, strangely enough, the Bush consigliere opposed the war. Or at least this young, committed conservative—who as fate had it turned 18 on Christmas Day 1968, a few weeks after John Kerry had taken command of his first Swift boat—opposed the draft, arguing against compulsory military service in a series of debates at his Olympus High School in Salt Lake City; like his boss, he never quite made it over to Vietnam. He went instead to the University of Utah, where he joined the College Republicans, under whose auspices he conducted, in the summer of 1972 (the season of the Watergate break-in), seminars on effective political espionage. The message wasn't "don't do it." The message was, "don't get caught." That year, when he was a candidate for the chairmanship of the College Republican National Committee, he almost was, when some fellow young Republican alerted the Republican National Committee (RNC) and the media to the existence of Rove's seminars. An internal investigation was launched, but the charges were dismissed by the man who then headed the RNC, George Bush Senior. Tellingly, he directed his animus not toward Rove, who had directed the dirty-tricks seminars, but toward Rove's opponent, whom the elder Bush accused (wrongly) of leaking the story to the press. The moral of this Bushian intervention was not lost on the young Rove. He hasn't gotten caught since.

KARL ROVE MAY NEVER HAVE GONE TO VIETNAM, BUT Campaign '04 is the crossroads at which America's most feral political adviser and its most unpopular and embittering war finally meet. A false cultural narrative—that the nation is still deeply split over the legacy of Vietnam, with the winking suggestion that said divide is, at bottom, the fault of the liberals like Kerry who opposed the war—is thus fused to the politics of "rapid and audacious attack." The narrative, which the mainstream media have been too resolutely lazy to correct (the right wing knows that it can almost always count on this!), has the maddening effect of working against the political side that represents the opinion of the large majority that looks on that war as a mistake. Questions about Vietnam that had appeared to be—that in fact were—long since settled to most Americans are suddenly raised anew. Kerry's testimony, which was actually delivered for the purpose of persuading senators to do all they could to end the war as quickly as possible and whose sentiments represented a decisive majority of American public opinion at the time (61 percent against the war and 28 percent in favor, according to a Gallup survey published the month after Kerry's testimony), is twisted and edited to sound like an attack on veterans.

That some veterans were embittered by that testimony is understandable, and that Kerry should have to defend it now is completely appropriate. That's politics. That it should have become a dominating fact of this campaign is scandalous, and it proves the crucial moral lesson of the Swift-boat affair, and of this campaign generally: Conservatives *must* divide the country to win elections. They must return to Vietnam, again and again. They have to advance contemptible fictions about Kerry's wounds being self-inflicted, so that the fog of doubt can slowly move in over him as it once did Mark White in Texas. They need to stoke their base voters' paranoia with a phony constitutional ban on gay marriage that neither Bush nor Rove has the slightest intention of actually pursuing, and they need to rally those voters to storm the polls to oppose gay marriage–related ballot initiatives in four crucial swing states. They have to keep the 1960s in play because it affords them the stereotypes that they need to win over voters who otherwise would have no truck with their agenda at all. They can't win on their agenda; not enough people support it.

George W. Bush famously claimed that he would be a

"uniter, not a divider." It was already a bit surreal when he said it on the campaign trail in 2000. What Bush was really saying during the 2000 campaign was, "Elect me, and our side won't have to spend eight years attacking and dividing as we did during Bill Clinton's tenure, because we'll be in power."

But even *that* hasn't turned out to be. Even power hasn't disturbed the conservative impulse to attack and destroy. If anything, the impulse has been strengthened. The savaging of former Senator Max Cleland. The use of 9-11 to attack any criticism as unpatriotic. The now-forgotten comparison of Senate Minority Leader Tom Daschle to John Walker Lindh, the "American Taliban" (a conservative political action committee, in a 2002 flier, called Daschle a "far greater danger" to the republic than Lindh).

This year, in Bush's presence on the campaign trail—where citizens attending the president's events are forced to sign a piece of paper endorsing his candidacy—Kerry was once referred to as "Jane Fonda's poster boy," according to *The Washington Post*. The uniter-not-divider didn't say a word. One particularly telling exchange, at which Bush's silence spoke volumes, took place in Beaverton, Oregon, on August 13. Readers of liberal blogs will be well familiar with the following exchange, but readers of, say, *The New York Times* will not, because it didn't appear there (the only major news outlet that ever reported the full exchange was ABC News):

> QUESTION: Yes, Mr. President, on behalf of Vietnam veterans—and I served six tours over there—we do support the president. I only have one concern, and that's on the Purple Heart, and that is that there are over 200,000 Vietnam vets who have died from Agent Orange. And no Purple Heart has ever been awarded to a Vietnam veteran because of Agent Orange, because it's never been changed in the regulations. Yet we have a candidate for president out here with two self-inflicted scratches. And I take that as an insult.
> (APPLAUSE)
> BUSH: Well, I appreciate that. Thank you. Thank you for your service. Six tours. Whew. That's a lot of tours.

Unifying, isn't it?

THESE TACTICS ARE BY NOW WELL-ESTABLISHED, YET Democrats fall for them every time. They still seem shocked when conservative groups launch personal attacks; even more incredibly, they seem more shocked still when the attacks work.

And make no mistake: These attacks did work, marvelously. They performed exactly the function they were supposed to perform. Kerry came into this campaign with two great advantages over Bush. First, unlike Bush, he had acquitted himself courageously when both were of an age to serve their country in the trenches. Second, unlike Bush, he had not launched a preemptive war under a discredited pretense that turned out to be a disaster. Those advantages could have been significant, even dispositive; but across the summer, they were completely erased. Kerry's national favorable-unfavorable ratings, at 60 percent to 26 percent, according to Gallup in mid-February, when he locked up the Democratic nomination, had fallen by summer's end, according to one poll, into the red zone: 32 percent favorable, 41 percent unfavorable. The polls that came out after the Republican convention, showing that Bush had opened up a lead over Kerry (the margins were arguable; the fact of Bush's momentum was not) were less notable for how much Bush had risen in them when compared with previous polls than for how much Kerry had sunk.

So the attacks worked. And, while the Swift-boat issue per se has run its course in the news cycle, there is little reason to believe that its impact has abated, or will abate right up until election day. *Unfit for Command* continues to command a high perch on the best-seller lists, and its success will finance plenty enough commercials to run through November 2. The "Swifties," as Kerry's antagonists were dubbed, were set to release a "documentary," *Stolen Valor*, in mid-September, which stands to rake in even more cash. The right-wing slime machine, among other things, is certainly a cash cow.

Most importantly of all, the attacks laid the groundwork for the central argument that Bush and Dick Cheney have been making and will make in the weeks leading up to the election: that Kerry can't be trusted on national security and fighting terrorism. Much as Napoleon recommended, the attacks came in rapid and audacious waves. First wave: the tarring of Kerry as a "flip-flopper," to establish him in the public mind as unreliable. Second wave: the smear of Kerry's personal heroism, a quintessentially McCarthyite salvo in that it called on Kerry to disprove a negative charge—to prove, in other words, that he wasn't lying about his Vietnam service—which is the very definition of McCarthyism. Third wave: the accusation, highly resonant in the post–9-11 age, that Kerry once harmed the American cause during wartime, for the purpose of suggesting that he's capable of doing so again. Fourth wave: the application of these "lessons" of the past to the present world situation, thereby to "prove" that Kerry is unfit to lead the country.

Kerry's favorable-unfavorable ratings, at 60 percent to 26 percent in mid-February, had plummetted by summer's end: 32 percent favorable, 41 percent unfavorable.

And, emotionally, the entire assault draws its energy from one of the central missions that contemporary conservatism assigns itself: keeping the country divided over the legacy of the 1960s. That the country is not, in fact, divided over that legacy, at least with regard to the Vietnam War, would seem at first blush to be a relevant fact. But facts (especially when the media don't bother to take note of them) are no match for well-financed propaganda (especially when the media give the propaganda extensive coverage). We've fought over Vietnam—fights always instigated by the right—in most of our recent presidential elections, and we'll keep fighting over Vietnam for as long as the media are willing to let the right get away with it. ■

2000, The Sequel

In theory, the Help America Vote Act was Congress' attempt to prevent the catastrophes of the last election from happening again. In fact, it may have made things even worse.

BY JOSHUA KURLANTZICK

SAM HEYWARD THOUGHT HE'D PAID HIS DEBT.

A tall, soft-spoken 45-year-old man from Tallahassee, Florida, Heyward was convicted in 1981 of a felony for buying furniture he knew was stolen. He spent a year in a prison work camp and then tried to rebuild his life. He got a steady job at a Tallahassee church that involved overseeing after-school programs for kids. And he tried to become a conscientious citizen: He got his voting rights restored in 1986—felons lose the right in most states—and cast ballots in nearly every subsequent election.

It was many years later that Heyward learned from Tallahassee City Commissioner Andrew Gillum that he, an African American, and others could be purged from Florida's voting rolls before the upcoming presidential election. Across Florida, the purge list included nearly 48,000 eligible voters who were supposed to be prevented from voting because they were felons who'd not had their civil rights restored by petitioning for them. Heyward was shocked. He used to proudly show friends his Florida voter-identification card. "This part of my life [the felony conviction] was over," Heyward said softly, staring at the ground. "Now I had to tell my pastor about it ... to open up this past time of my life."

Unusually, Heyward fought back. With the help of volunteer lawyers from People for the American Way, he tried to get a copy of the purge list to protest his inclusion and to warn other people. Some of the list's names had leaked out, and apparently thousands of others may have been wrongfully listed. Yet Florida's top election officials, appointed by Governor Jeb Bush, refused to publicly release a copy. "Of course, there's going to be people on there who are not really felons," a spokeswoman for Florida's secretary of state, who runs elections, told reporters.

Worse, the purge list appeared highly partisan. Of the nearly 48,000 people on it, roughly 22,000 were African Americans, who vote mainly Democratic, and only 61 were Hispanics, who in Florida vote overwhelmingly Republican, even though each group represents about 10 percent of the Florida population. As information about the list leaked out, a head of Florida's elections division quit his job, reportedly telling friends that he was feeling too much political pressure to purge voters before November. Nearly simultaneously, a Florida appeals court ruled that Jeb Bush's administration was doing little to help felons get their civil rights back, declining applications to 125,000.

Sound familiar? In the razor-thin 2000 race, nearly 58,000 Florida voters—mostly Democrats—were kept from the polls by just such a list. But the list Heyward's name appeared on was revealed only four months ago. And it's only a small indication of the massive problems looming over November's election. Since the 2000 fiasco, Congress and the White House promised to reform the nation's broken election system, preventing the kind of intimidation, vote stealing, and chaos that marred the Bush-Gore vote. But since 2000, Republicans have actually used election reforms to ensure that the 2004 vote may be more even partisan, more disenfranchising, and more problematic than 2000. And Democrats have only themselves to blame.

AFTER NOVEMBER 2000, IN WHICH ROUGHLY 4 MILLION votes went uncounted or were damaged, popular disgust forced national leaders to address the issue. To do so, Congress in 2001 and early 2002 sculpted legislation called the Help America Vote Act (HAVA). HAVA was to be essentially the first federal legislation mandating and supervising federal voting procedures, which previously had been left up to states.

But congressional Republicans apparently saw it as an opportunity to push through measures that would, in effect, make it harder for Democratic-leaning voters to vote. One of the biggest issues was IDs. One congressional source told *The American Prospect* that, in early 2002, Republicans in Congress essentially ensured that HAVA wouldn't pass unless Congress included a provision mandating that first-time voters would have to show an ID at the polls, even if they were already on the voter rolls. GOP leaders had been trying to pass such a law since 1979, says Lionel Leach of the NAACP's Voter Fund, because they know poor, first-time minority voters—who usually vote Democratic—often don't have IDs to show and are scared off by signs at the polls (illegally) asking them for many types of identification. "In areas like Passaic County [New Jersey], in Latino districts, the Saturday before the election, [voters] get notes saying they have to have ID, and police will escort you to the polls, striking fear into everyone," says Leach. (By comparison, middle- and upper-class whites, the GOP base, have less fear and fewer ID problems.) HAVA, while not legalizing such activities, has done nothing to discourage the practice.

Not only poor minorities are likely to be affected, though.

College students in certain states historically lean Democratic—and historically have been prevented from registering where their dorms are, a dubious ban at best. "A lot of local election boards are looking to disenfranchise students," says Neil Rosenstein, an expert on young-adult voting at the New York Public Interest Research Group. "HAVA has opened up a window of new ways to disenfranchise students." Because student voters are predominantly first-time voters, HAVA's first-time voter-ID requirement could potentially be a weapon used by local election boards, which could tell poll workers not to accept a student ID as proof or to use the statute to make it hard for students to prove residence, which is illegal, Rosenstein says.

In addition to requiring IDs for first-time voters, HAVA had other GOP–friendly elements. It allowed states to develop purge lists of felons without requiring that they simultaneously develop lists of former felons—usually Democrats—who'd had their voting rights restored. (Such a list would make it harder for poll workers to turn them away.) It also set no federal guidelines of who should oversee elections, allowing states to retain biased election officials—like Katherine Harris.

Lastly, the law authorized states to upgrade old lever and punch-card voting machines, which had failed in 2000, by purchasing new touchscreen machines—without ensuring that the touchscreen equipment was secure or providing paper receipts that could be used in a re-count.

This was a disaster waiting to happen. A month after the law's passage, Georgia debuted touchscreen voting in the November 2002 elections. In that contest, Democrat Max Cleland, who was leading the senatorial race until just before election day, lost to the Republican challenger, Saxby Chambliss, by 7 points. During the voting, many machines froze, and the memory cards from heavily Democratic Fulton County mysteriously disappeared amid machine failures; computer-science experts later found that machines made by Diebold Inc., such as those used in Georgia, lacked basic security measures. The machines left no paper trail, and it turned out that Diebold was run by executives who contributed lavishly to GOP campaigns. In the weeks before Cleland's loss, a Diebold worker had visited Georgia and changed some of the software on the voting machines.

Similarly, in Florida's 2002 gubernatorial race, touchscreen machines failed so often that many votes in Miami-Dade County simply weren't counted. Overall, nearly 10 states had problems with touchscreen machines between 2002 and 2004.

In Congress, Representative Rush Holt and others became so concerned about the machines, among other potential problems, that they drafted an amendment to HAVA that would require touchscreen machines to have a paper record. Bob Ney, chairman of the House Administration Committee, has not allowed Holt's legislation, offered in May 2003, out of committee. Meanwhile, House and Senate Republicans have introduced "smokescreen" versions of Holt's bill that contain similar provisions but don't call for verifiable voting until 2006.

Unfortunately, the House and Senate Democratic leadership laid down for the GOP, both in the initial HAVA debates and over the Holt amendment, knowing that Democratic interest groups were pushing hard for reform. Only Senators Hillary Rodham Clinton and Charles Schumer of New York voted against HAVA. "The House Democrats just gave up on the ID requirement," says one congressional source. And even after the touchscreen voting-machine disasters, says the congressional source, Representative Steny Hoyer and Senator Christopher Dodd "came out with guns blazing" to defend the compromised law they'd written. In March, Hoyer and Dodd sent a "Dear Colleague" letter to members of Congress rebutting criticisms of HAVA. "Having the Democrats on the Dear Colleague letter gave [the GOP] some cover," admits another congressional source.

St. Louis Blues: A judge's order prevented citizens in mostly black areas of St. Louis from voting.

THERE ARE SOME GOOD ELEMENTS OF HAVA THAT MIGHT have helped more voters get to the polls. But high turnout usually benefits the Democrats, and when the Republicans took control over both houses of Congress in 2002, they set about making sure that these elements were stalled as long as possible.

Key among these is the Election Assistance Commission (EAC), a new federal organization that would disburse money to states to upgrade voting systems, issue guidelines, and hold hearings to help make voting as fair as possible. The commission was supposed to be set up within 120 days of HAVA's passage, EAC Vice Chairwoman Gracia Hillman told the *Prospect*. The White House first contacted commission appointees five months after HAVA passed, and, Hillman says, then–Senate Majority Leader Trent Lott told EAC appointees that their approval process would go slowly. "We

didn't get appointed and started until December 2003," Hillman says. "All we did between then was read papers about our health insurance and benefits of the job. ... I wanted to touch base with other commissioners [before December 2003] but the White House asked us to hold off." In fact, the EAC didn't even have office space until April 2004. "The Bush administration was so slow in getting [the EAC] off the ground—I ask myself whether this was purposeful," says Representative Marcy Kaptur, a longtime advocate of election reform.

Worst of all, the GOP severely underbudgeted the EAC and broader election reform. While the EAC's proposed budget was $10 million for 2004, Congress gave it only $2 million. While HAVA proposed that overall election-reform efforts be given more than $1 billion in 2004, President Bush asked Congress for less than half that amount.

Underfunded, unorganized, blocked at every turn, the EAC could not perform its role. Its commissioners admit that the group was unable to provide enough money to states or much guidance on upgrading voting machines, standardizing voter roles, making readable ballots, and ensuring the quality of poll workers and election officials. Instead, many states went ahead and bought touchscreen machines without first really testing them. "The commercial [touchscreen] companies were bearing down on county officials ... but they had no standards [from the EAC]," says Kaptur. "[Local] supervisors of elections felt like we were just islands out here," agrees Ion Sancho, supervisor of elections in Florida's Leon County, a region encompassing Tallahassee.

HAVA did not create nonpartisan election monitors, so in Florida, elections are run by Jeb Bush appointees. In Michigan, the top election official is a Bush-Cheney operative.

TODAY, THE WORST NIGHTMARES OF HAVA'S CRITICS SEEM to be coming true. To begin with, in many parts of the country, GOP election officials have quietly begun to use the new voter-ID provision to disenfranchise key voting blocs.

Luther Lowe is a senior at the College of William & Mary in Williamsburg, Virginia, and a Democrat who spent the summer of 2004 interning for West Virginia Senator Robert Byrd. In fall 2003, he decided to launch a campaign to register 3,000 William & Mary students. "Williamsburg had traditionally let students vote, as long as they didn't vote in high numbers," he says. The city's position was strengthened by the federal statute backing IDs for first-time voters. After Lowe launched his voter drive, Wiliamsburg sent out lengthy questionnaires asking students who attempted to register for personal information. While legally students should be allowed to vote where their dorms are, the city was using the questionnaires to intimidate them and prove they weren't residents. Based on the answers to those questionnaires, some William & Mary students were prohibited from voting.

Lowe's story is hardly unique. "In many states, including ... Michigan and New Hampshire, there are laws or procedures that prevent students from registering to vote in their college communities," says Jennifer Weiser, who focuses on youth voting issues at the Brennan Center for Justice at New York University. In fall 2002, University of New Hampshire students who went to the polls found literature there suggesting that voting locally could harm their financial aid, though in fact it could not. In November 2003, the district attorney in the area surrounding Prairie View A&M University, a historically black college in Texas, sent students at the school a letter saying that they didn't qualify to vote locally. The district attorney then threatened to prosecute students who tried to vote, a clear violation of civil-rights law. In the subsequent election, in March 2004, relatively few Prairie View students voted.

These problems are being encouraged from all sides. Though the EAC was supposed to receive at least $3 million for programs to help young adults vote, the White House appropriated no money for these programs in fiscal year 2003. What's more, several of the most important swing states have instituted the most restrictive laws on identification for young voters. And poll workers will be less prepared to deal with identification issues than in 2000 because so many new laws have been passed. A recent study by the Brennan Center found that in New York state, election officials in only 18 of 45 counties understood voter-ID requirements.

Native Americans and other minorities are falling victim as well. In South Dakota, Native Americans provided a crucial voting bloc two years ago for Democratic Senator Tim Johnson, who won a very tight race. Before 2002, South Dakota had no requirements for first-time voters to show ID at the polls. After HAVA, the state passed a relatively restrictive ID law; Native Americans don't have many forms of ID, so such an ID law is tougher on them than on other voters. In the state's elections this June, the *Prospect* has learned, at least 40 Native Americans were turned away from polls because they did not show a photo ID. "County commissioners were telling [poll workers] to ask for ID," says Bret Healy, executive director of Four Directions, a nonprofit group set up to help enfranchise Native Americans. And "at the Cheyenne River reservation, there were poll watchers hired by the GOP to challenge each person who didn't have ID."

South Dakota Secretary of State Chris Nelson has vowed to investigate, but so far has done nothing. Nelson is a Republican elected official; HAVA did not create nonpartisan election monitors, and neither has South Dakota. Similarly, in Florida, elections are run by Jeb Bush appointees; in Missouri, the top election official is also taking part in the Bush-Cheney campaign; in Michigan, the top election official is one of the state chairs for George W. Bush's re-election drive. These partisans are rewriting voter rolls, potentially purging eligible voters.

As for the touchscreen voting machines, several states have responded to problems by halting their purchase of them. In some states, the machines that remain are most

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SPECIAL REPORT: U.S. HUMAN RIGHTS

BRINGING HUMAN RIGHTS HOME

Why universal rights protect America

DOROTHY Q. THOMAS
ANTHONY LEWIS
JOHN SHATTUCK
DEBORAH PEARLSTEIN
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OCTOBER 2004

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Into the Bright Sunshine

The value of human rights in the United States

BY DOROTHY Q. THOMAS

THE MOST OBVIOUS VALUE of human rights to the post-Holocaust world has been to set a limit on government power and shine a light on its abuses. The limit comes from the revolutionary idea, conceived in the immediate aftermath of World War II, that all governments are constrained in their actions by the inherent dignity and inalienable rights of their people. The light comes from the people themselves, who have since risen up the world over to defend the fundamental principle that national sovereignty can never be a defense for barbarity and to demand accountability from those who violate this cardinal rule. "Save us from ourselves," Eleanor Roosevelt said as she presided over the United Nations' adoption of the Universal Declaration of Human Rights in 1948, "and show us a vision of a world made new."

The value of this new vision of a world governed by human rights has been less obvious to one of its original proponents: the United States. As Harold Koh points out in this special report, the years between the Second World War and the current global war on terrorism saw a willingness on the part of the U.S. government to promote a set of universal standards abroad that it proved unwilling, with few exceptions, to apply at home. The result was a steady *de*valuation of human rights in the United States that is epitomized, as Elisa Massimino, Deborah Pearlstein, and Alison Parker recount, by the current U.S. administration's defense of torture, its use of detention without review, and its doctrine of preemptive war. The Supreme Court's recent need to remind the executive branch (in *Hamdi v. Rumsfeld*) that "a state of war is not a blank check for the president when it comes to the rights of the nation's citizens" indicates just how far the U.S. government has strayed from the core values of human rights. The Court's majority decision to do so, however, reflects something else: the increasing *re*valuation of human rights,

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not only by the U.S. judiciary but also by the U.S. rights community and the public more generally.

The U.S. courts and the legal defense organizations like the American Civil Liberties Union that appear before them are increasingly pointing to foreign and international rights standards and jurisprudence. In its last two terms alone, the U.S. Supreme Court found it persuasive to cite human-rights treaties prohibiting race and sex discrimination, a European Court of Human Rights sodomy decision, international practices with respect to the death penalty, and the law of nations in deciding important cases addressing affirmative action, same-sex conduct, execution of people with mental retardation, and the rights of detainees at Guantanamo Bay, Cuba. "We face an increasing number of domestic legal questions that directly implicate foreign or international law," Supreme Court Justice Stephen Breyer told the American Society of International Law in April 2003. "This change reflects the 'globalization' of human rights, a phrase that refers to the ever-stronger consensus ... as to the importance of protecting basic human rights ... and the related decision to enlist judges ... as instruments to help make that protection effective in practice." In U.S. courts today, human rights and other international legal norms are clearly seen as more reliable guideposts to domestic issues than they were in the past.

Within the U.S. rights community generally, reliance on human rights is now seen as a proactive approach to domestic advocacy in several key ways. First, as Gay McDougall recalls, by affirming federal obligations to uphold fundamental freedoms, human rights offer a powerful counterbalance to states rights' arguments that have curtailed national-rights advocacy since the days of Jim Crow. Second, as Cass Sunstein argues, by codifying the obligation of governments to ensure economic, social, and cultural rights, human rights set forth a progressive alternative to the "up-by-your-bootstraps" approach to eliminating poverty that now dominates U.S. policy. Third, as several authors here suggest, by framing rights in human rather than single-issue or identity terms, human rights supply a viable antidote to the turf and other divisions endemic to U.S. social-justice work. And by connecting national to international justice, human-rights standards provide a welcome check on U.S. unilateralist tendencies that have rarely been more blatant or more damaging than they are today.

Finally, human rights have tremendous value at the grass-roots level. Local communities across the country are forceful voices for human rights in the United States. For poor, immigrant, and minority communities in the United States, the notion of human rights as dependent on one's humanity rather than on one's status is particularly resonant. "Human rights give the people most affected by abuse a place at the table," says Ajamu Baraka, executive director of the national Network for Human Rights in the United States, a new membership group of more than 100 mostly community-based organizations. "We have these rights simply by being human, and for disenfranchised and vulnerable communities in this country, that is a very hopeful and powerful basis for advocacy."

At the Democratic national convention in 1948, Hubert Humphrey urged the Democratic Party to adopt a civil-rights platform to "get out of the shadow of states' rights and walk forthrightly into the bright sunshine of human rights." Perhaps, given the growing judicial, activist, and popular recourse to human rights in the United States (and coupled with some prescient national leadership), the journey that began with the passage of the Voting Rights and Civil Rights acts in the past century might continue with the adoption of major human-rights policies in this one. These could include U.S. support for the International Criminal Court, legislation to prohibit torture by U.S. officials wherever it occurs, and ratification of the international treaties that defend women's, children's, economic, social, and cultural rights. With these steps, the United States might more fully embody the human-rights values of dignity, equality, and accountability that it helped to envision for the world more that 50 years ago—and begin, before it's too late, to save us from ourselves. ■

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The Road to Abu Ghraib

How the United States played a large role in creating international human rights—and then abandoning them

BY ANTHONY LEWIS

FROM THE LAST, BEST HOPE OF earth to Abu Ghraib: What has happened to the vision of America as the land of justice? In countless ways, at home and in the world, this country has abandoned its commitment to the protection of human rights.

The change is all the more stark because Americans played such a large part in creating the very concept of international human rights. The United States Congress, 30 years ago, began demanding that countries receiving U.S. aid live up to basic standards of humanity. Private organizations such as Human Rights Watch highlighted the repressive cruelties of regimes from the Soviet Union to Latin dictatorships. American constitutional rights—guarantees of due process of law, the right to counsel, freedom of speech—became an international standard.

That enlightened leadership seems now to belong to another age. The United States is best known now, in world human-rights terms, for its single-minded opposition to the International

Criminal Court, created to bring the authors of genocide and other war crimes to justice. It has pressed country after country for guarantees that Americans will be immune from the court's process.

At its Guantanamo Bay prison camp for alleged terrorists, the United States has renounced its treaty obligations under the Third Geneva Convention. The convention requires that people held as prisoners of conflict be offered individualized hearings before a competent tribunal to determine whether they are rightly held or, as they may argue, were taken mistakenly. President Bush swept that commitment aside by finding that all the prisoners at Guantanamo were "unlawful combatants," a term not found in the Geneva Conventions. Then his administration argued that the prisoners could not go to U.S. courts to test their detention—until the Supreme Court rejected that position.

Perhaps the most extreme departure from American law and tradition has been Bush's claim of power to detain American citizens indefinitely, without trial or access to counsel, if he finds that they are "enemy combatants." The Supreme Court, in the case of Yaser Esam Hamdi, held that at least the detainee must have a fair opportunity to argue his innocence before a neutral decision-maker.

It remains to be seen how this ruling will influence government practice. Since the Hamdi decision, the government has continued to use special military tribunals in Guantanamo, and several prisoners have been found to be so-called enemy combatants and returned to indefinite confinement.

Presidential policy has altered the rights and the lives of obscure individuals, who are treated in ways that used to be regarded as unthinkable. Shortly after the terrorist attacks of September 11, Attorney General John Ashcroft ordered the FBI to arrest aliens who might have a connection to terrorism. Thousands were arrested, held for weeks and months, then charged with minor immigration violations. Later we learned what happened to some of them.

One was Javaid Iqbal, whose treatment was described by Nina Bernstein in *The New York Times* this May. He was an immigrant from Pakistan who lived on Long Island. He was arrested there on November 2, 2001, and held for nine months.

At a federal detention center in Brooklyn, Iqbal was kicked in the stomach with steel-toed shoes, left out in the rain, and then put in an air-conditioned cell. Those are a few of the things that happened, as described by Iqbal. They fit a report by the Justice Department's inspector general, who found that alien

detainees at that center were physically and psychologically abused.

Secrecy kept Iqbal's fate from his family for a long time. Attorney General Ashcroft ordered legal proceedings in the cases of alien detainees held in secret. Families were not told where the detainees were. Iqbal's 22-year-old son, Paul Harrison, a U.S. citizen, said: "I never knew what happened. I felt like he fell off the face of the earth."

Similar secrecy has blanketed many other actions taken by the Bush administration in disregard for individual rights. Hamdi and the other American detained as an enemy combatant, Jose Padilla, have been held incommunicado in Navy brigs. The lawyer who took Hamdi's case to the Supreme Court, Frank Dunham Jr., told the Court that when he finally was allowed to meet his client, Hamdi gave an account of his actions in Afghanistan. But Dunham said he could not tell the Court about it because the government had classified everything said at the meeting.

Then there was the case of Brandon Mayfield, a 37-year-old lawyer in Aloha, Oregon. He was arrested this May for reasons unstated at the time, and held in total secrecy for two weeks. The Justice Department said only that he was a "material witness," using a statue that was formerly used to hold potential witnesses who might flee but that has become a catchall for detentions.

Mayfield, it turned out, was suspected of a connection with the terrorist train bombing in Madrid, Spain. The FBI said his fingerprints matched some found by the Spanish police—but the Spaniards told the FBI there was no match. In the end, the bureau admitted it was wrong, released Mayfield, and apologized.

The Mayfield case shows how the usual protections of U.S. criminal law—the right to a hearing in public, for one—have been drained of some of their meaning by what President Bush calls the war on terrorism. From the top of the federal government to federal prison guards in Brooklyn, there is what could be called a culture of indifference to rights.

It is hardly the first time in American history that fear has brought repression. Franklin Delano Roosevelt ordered 100,000 Japanese Americans to be taken from their West Coast homes during World War II and confined in desert camps. Fear of communism led to widespread injustice in the years of the Red Scare. Fear of terrorism may be a longer lasting justification for sweeping aside constitutional rights.

But there is another reason for the abandonment of America's commitment to human rights at home and abroad. The country is governed now by men who have shown no interest in that commitment. Ashcroft's view of free speech was made clear, after 9-11, when he said that anyone who accused the administration of violating civil lib-

erties was siding with the terrorists. As governor of Texas, Bush sent dozens of prisoners to their death with a speed that smacked of indifference.

The point is not a partisan one. A way to test it is to imagine that the late Edward Levi, President Ford's attorney general, had been attorney general these last three years. He would have been firm on terrorism—and firm in his defense of constitutional rights. Levi was a conservative who believed profoundly in the American system and its institution. Which is to say that he believed in law.

The Bush administration's resistance to the International Criminal Court, its callous treatment of aliens in this country, its ignoring of the Geneva Conventions, its double standard for the United States and others, its disdain for human rights—these things are not abstractions. They have consequences: the brutalization of human beings in America and in American prisons abroad. A broader consequence is to blunt America's constructive influence on human rights globally.

In our system, freedom depends on commitment to the supremacy of law. Without that commitment, government lawyers can write memoranda justifying torture. Abu Ghraib can happen. ■

ANTHONY LEWIS *is a former* New York Times *columnist.*

A Lawless State

How to restore America's global standing as a beacon of freedom—both internationally and with its own citizenry

BY JOHN SHATTUCK

THERE'S A PARADOX AT THE heart of U.S. foreign policy: As the Bush administration asserts unilateral global power, the influence and respect of the United States hits rock bottom, and as the United States professes its desire to expand democratic rights around the world, its actions undermine its stated goals. No issue in this political year is more urgent than addressing this disastrous contradiction. Restoring America's commitment to the rule of law would be a good way to start.

In the Bush war on terrorism, Washington has shown a reckless disregard for basic principles of international human-rights law like the Geneva Conventions, the Convention Against Torture, and the International Covenant on Civil and Political Rights. It has created a climate of lawlessness in which foreign detainees in U.S. custody overseas have been brutally abused, thousands of foreign citizens are held as "enemy combatants" indefinitely without being accorded the status of prisoners of war, and repressive regimes around the world get a green light to crack down on political dissidents and religious and ethnic minorities in the name of fighting terrorism. The result has been a drastic increase in the number of people convinced that America is their enemy and stepped-up recruiting by terrorist groups throughout the Muslim world and beyond.

As several articles in this collection demonstrate, the lawlessness in the administration's foreign policy is also reflected in disdain for civil liberties at home. Thousands of men with foreign backgrounds have been held secretly in U.S. prisons and detention centers without charges for months at a time. The Justice Department has claimed unprecedented authority to arrest U.S. citizens in the United States without charges and deny them legal counsel on the mere assertion that they are enemy combatants. On June 29, the U.S. Supreme Court invalidated this breathtaking assertion of executive power, with one of its most conservative members, Justice Antonin Scalia, reminding the administration that "[t]he very core of our liberty ... has been freedom from indefinite imprisonment at the will of the Executive." Longstanding principles of privacy that reflect colonial America's antipathy for the hated secret searches of King George III have been eroded by Congress' hasty enactment in 2001 of legislation drafted by the administration with the ironically Orwellian title USA PATRIOT Act.

THE UNITED STATES IS SQUANdering one of its greatest assets: its commitment to human rights and the rule of law. At the G8 summit in June 2004, President Bush called for the transformation of authoritarian regimes in the Middle East into open, democratic societies. The president's appeal met with disdain in Arab countries, not because there is a lack of appetite for reform in the region but because the Bush administration has undermined the moral authority of the United States by trying to impose democracy through the unilateral and preemptive use of force in Iraq. In the Middle East, local reformers on the ground report that they no longer dare use the words "democracy" and "human rights" in their own communities. On the Arab street, these terms are now synonymous with U.S. military occupation, high civilian casualties, and the abuse of prisoners.

All over the world today, people see little connection between their own aspirations for freedom and security and the rhetoric and actions emanating from Washington. Sweeping aside more than a half-century of international law (and the institutions and alliances within its framework created by bipartisan American leadership), the Bush administration has weakened our values and our capacity to project them.

In the past, the United States scored major diplomatic victories for human rights and freedoms by working, with allies, within a framework of international law. The drafting of the Universal Declaration of Human Rights by the fledgling United Nations under the prodding of Eleanor Roosevelt launched the modern era of human-rights advocacy. President Jimmy Carter mobilized

democratic governments to press for the release of political prisoners held by repressive regimes, Ronald Reagan invoked the Helsinki Accords to champion the cause of dissidents in the Soviet Union, and George Bush Senior joined with western European governments to provide assistance to the fledgling democracies of post–Cold War central and eastern Europe. During the administration of Bill Clinton, the United States worked with NATO to end the human-rights catastrophe in Bosnia and prevent genocide in Kosovo. Each of these successes was grounded in human-rights law.

The lawlessness in American foreign policy today emanates from the top. In a January 2002 memorandum reporting a decision by the president, White House Counsel Alberto Gonzales wrote that the war on "terrorism renders obsolete [the Geneva Conventions'] strict limitations on the questioning of prisoners." His only rationale for that sweeping assertion was that "terrorism is a new type of warfare not contemplated when the conventions were framed." But despite new 20th-century challenges such as guerrilla war and nuclear war, until George W. Bush, no American president had questioned the basic rules of international humanitarian law, including, notably, Presidents Lyndon Johnson and Richard Nixon during the Vietnam War and Bush Senior during the Gulf War.

The reasons for following humanitarian law are abundantly clear, and they were spelled out inside the Bush administration by Secretary of State Colin Powell. Responding to the Gonzales memo, Powell warned in his own memorandum to the president that "revers[ing] over a century of U.S. policy and practice" would "undermine the protections of the law for our troops," provoke "negative international reaction, with immediate adverse consequences for our conduct of foreign policy," and diminish "public support among critical allies, making military cooperation more difficult to sustain." Brushed aside at the time like the law itself, Powell's memo today reads like a prophetic prediction.

TO REPAIR THE DAMAGE DONE OVER the last four years to American credibility around the world, we need to restore the rule of law to American foreign policy.

First, the president should announce that the United States will apply as a matter of policy and practice the Geneva and Torture conventions, the International Covenant on Civil and Political Rights, and all other international human-rights and humanitarian instruments that have been ratified and adopted as part of our domestic law. This would help rebuild American influence with potential allies and provide protection to American soldiers and civilians abroad.

Until George W. Bush, no American president had questioned the basic rules of international humanitarian law, including Presidents Johnson and Nixon.

Second, the United States should work to strengthen international law on terrorism. By leading an effort to stigmatize terrorism as a crime against humanity, the United States would enhance its ability to forge alliances to isolate terrorists as outlaws while strengthening international human-rights law.

Third, the United States should protect human rights at home to demonstrate to the world the values it stands for. The highest U.S. law-enforcement official, Attorney General John Ashcroft, denigrated these values by warning that "those who scare peace-loving people with phantoms of lost liberty ... only aid terrorists." But security depends on liberty. Citizens in an open society have the freedom to separate good policies from bad, and correct errors.

Fourth, the United States should resume its leadership in strengthening the system of international law that it helped create. It should rejoin international negotiations on such critical issues as climate change, nonproliferation of weapons of mass destruction, and international justice, and move to ratify human-rights treaties long pending before the Senate, most notably on rights of women and of children.

Fifth, the United States should actively support those seeking to promote the rule of law, democracy, and human rights in their own societies. Because repression breeds hate by closing off avenues for peaceful dissent, and because hate fuels terrorist movements, human-rights reformers are shock troops in the struggle against terrorism. But democracy cannot be delivered through the barrel of a gun. Assistance to those who are working to build their own democratic societies must be carefully targeted and planned, sustained over time, and based on an understanding of the unique circumstances and profound differences among countries, cultures, and religions.

Finally, the United States should work with other nations and the United Nations to reassert America's leadership role in preventing or stopping humanitarian catastrophes in failed states. During the 1990s, a doctrine of humanitarian intervention was developed under U.S. leadership and was invoked to stop the genocide in the former Yugoslavia. Because the Iraq intervention was unilateral, preemptive, and poorly planned, it has given humanitarian intervention a bad name and destroyed U.S. credibility on human rights. As a result, in Liberia, Haiti, Sudan, and other failed states, war criminals once again are terrorizing civilian populations while the United States and the international community stand idly by.

It's time to end America's lawless state and restore its role as a beacon of freedom and a builder of alliances within the rule of law. Otherwise, tyrants and terrorists will continue to flourish in a world of diminished American leadership. ■

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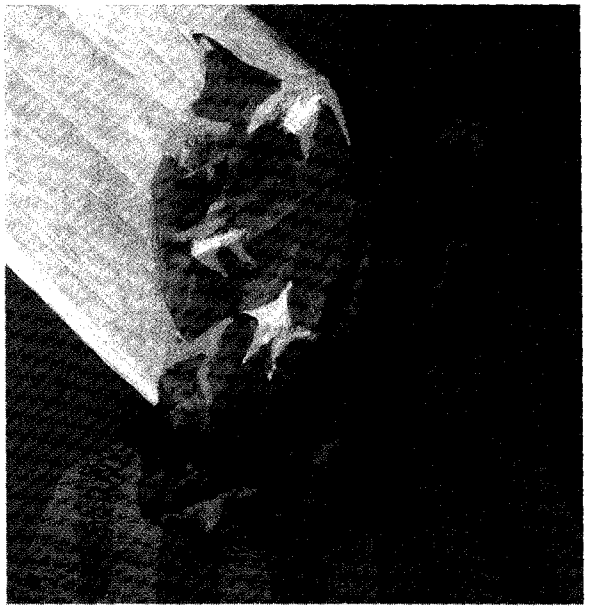
Rights in an Insecure World

Why national security and civil liberty are complements

BY DEBORAH PEARLSTEIN

ALMOST AS SOON AS THE PLANES CRASHED INTO THE TWIN TOWERS, SCHOLARS, pundits, and politicians began asserting that our most important challenge as a democracy now is to reassess the balance between liberty and security. As Harvard human-rights scholar Michael Ignatieff wrote in *The Financial Times* on September 12, "As America awakens to the reality of being at war—and permanently so—with an enemy that has as yet no face and no name, it must ask itself what balance it should keep between liberty and security in the battle with terrorism."



Long before anyone had a clear idea of what went wrong—much less how to make sure it never happened again—public debate began with the assumption that something about the current "balance" was partially to blame for the attacks' success. As the attorney general testified in December 2001, "al-Qaeda terrorists are told how to use America's freedom as a weapon against us." In embracing the USA PATRIOT Act just weeks after the attacks, congressional member after congressional member stood to explain, as then–Senate Majority Leader Trent Lott put it, "When you're at war, civil liberties are treated differently." Minority Leader Dick Gephardt embraced the assumption as well, saying, "[W]e're not going to have all the openness and freedom we have had."

Our open society had made us less secure. The converse was as clear: A less free society would be safer. We had posited a solution before we had identified the problem. And we had based the solution on the premise that liberty and security are a zero-sum game.

WHILE THE DRIVE TO THINK ABOUT SEPTEMBER 11 in terms of its implications for personal liberties was understandable, the balance metaphor is badly flawed. As the commission report itself demonstrates, the fundamental freedoms of our open society were not the primary (or even secondary) reason the terrorists succeeded on September 11. FBI agents in Minneapolis failed to search terrorist suspect Zacarias Moussaoui's computer before the attacks, not because constitutional restrictions against unreasonable searches and seizures prevented them from doing so but because they misunderstood the tools the law provided. The vast majority of the September 11 hijackers were able to enter the United States not because equal-protection provisions prevented border officials from targeting Arab and Muslim men for special scrutiny but because, according to the commission, "[b]efore 9/11, no agency of the U.S. government systematically analyzed terrorists' travel strategies" to reveal how terrorists had "detectably exploit[ed] weaknesses in our border security."

It is also not the case that a society less concerned with human rights is per se better protected from terrorism. On the contrary, some of our most rights-damaging measures since September 11 have had a neutral or even negative effect on counterterrorism. Most important, it is not the case that enhanced security invariably requires a compromise of human rights.

The balance metaphor has made crafting a security policy response to September 11 easy—and often misguided. It has also made policy unduly prone to undermine human rights. Three years after the fact, both rights and security are the worse for wear.

CAUGHT IN THE BALANCE

The PATRIOT Act became an important first example: It allows the FBI to secretly access Americans' personal information (library, medical, telephone, and financial records, among other things) without needing to show to an independent authority (like a judge) that the target is particularly suspected of terrorist activity. Yet the September 11 com-

mission's report and other studies done since the attacks suggest that our primary intelligence failure on September 10 was not having too little information; our problem was failing to understand, analyze, and disseminate the significant quantity of information we had. For example, Minneapolis FBI agents did not understand what "probable cause" meant (the level of evidence required to obtain a regular criminal search warrant)—so they did not understand that they could have secured a run-of-the-mill search warrant on Moussaoui. This failure is a problem not remedied by the PATRIOT provision that gives the FBI power to trawl secretly through Americans' records. That power is all about gathering more data; it does nothing to address the problem of analysis that we still have. Still, changing the law was fast and easy—far easier than changing culture, competence, or overarching foreign policy. Imposing upon rights could become a policy substitute for enhancing security.

A similar approach was evident in the FBI's "voluntary" interview programs in certain immigrant and minority communities—a process that expended enormous resources and deeply alienated the communities whose cooperation in intelligence gathering may be needed most. After September 11, hundreds of foreign nationals in the United States were wrongly detained, unfairly deported, and subject to mistreatment and abuse under government programs, from special registration requirements to voluntary interviews to the detention of those seeking political asylum from a list of predominantly Arab and Muslim countries. Yet an April 2003 Government Accounting Office report on the effects of these interviews revealed that none of the information gathered from the interviews had yet been analyzed for intelligence, and there were "no specific plans" to do so. Indeed, from a security point of view, information overload can make matters worse. Instead of looking for a needle in a haystack, we must now find a needle in a field full of hay.

And just as our security needs for more careful intelligence assessments, thorough analysis, and greater information sharing are at their height, the executive-branch impulse has been to crack down on information shared not only with the public but with Congress itself. In 2003, the executive branch classified 25 percent more information (based on the number of executive-agency determinations that certain information should be classified) than the year before, which itself had seen a large rise. The CIA's numbers went up 41 percent, the Justice Department's 89 percent. At the same time, the amount of information being declassified fell to half what it had been in 2000, and one-fifth of 1997 levels. And this is not just about traditionally classified information. Last December, for example, the Defense Department announced a new policy preventing its own inspector general from posting *unclassified* information that was, in the Pentagon's estimation, "of questionable value to the general public." At

Criminal Justice and the Erosion of Rights

While human-rights observers have rightly focused on terrorism-related developments in the U.S. criminal-justice system, the trend toward limited procedural protections for defendants and a shrinking judicial role well predates the September 11 attacks. Indeed, security has been a central justification for rights-limiting changes in the criminal-justice system for decades.

Much like the war on terrorism today, the dominant feature of criminal-justice policy in the 1980s was the vigorously marketed war on drugs. Once declared in 1982, that war quickly became the federal government's primary domestic-security focus. The Justice Department shifted huge numbers of personnel previously occupied with white-collar criminals to anti-drug enforcement in the inner cities. As the Drug Enforcement Administration's New York City office chief later wrote of the mid-'80s, it "was the hottest combat reporting story to come along since the end of the Vietnam war."

Out of the drug war grew a series of rights-limiting legislative proposals and laws, including measures that would involve the military in drug-control efforts, expand the death penalty to certain drug-related crimes, and ease restrictions on allowing illegally obtained evidence to be introduced in drug prosecutions. Notable among these was the advent of mandatory minimum sentencing. With congressionally set sentences, judges lost much of their ability to tailor punishment to particular offense and offender—a development that both limited the independent discretion judges had long enjoyed and sometimes produced grossly disproportionate results. By the 1990s, keen to diffuse the stereotype that Democrats were "soft on crime," President Clinton asked Congress to endorse three-strikes laws then growing in popularity in the states. Under these laws, after three felony convictions—in some states, no matter how trivial the underlying offenses—an offender could be sentenced to a lifetime in prison.

Just about the time that Republican efforts had failed to enact sweeping habeas corpus reform legislation—designed to limit defendants' appeals in federal court and speed the imposition of the death penalty—Americans witnessed the 1995 bombing of the Murrah Federal Building in Oklahoma City. The resulting legislation, the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA), included a number of sensible counterterrorism measures designed to make it easier, for example, to track the origin of chemical explosives and restrict the sale of potentially deadly biological agents. But AEDPA also sharply curtailed defendants' ability to have unconstitutional state-law criminal convictions overturned in federal court.

The AEDPA restrictions picked up on a series of Supreme Court decisions from the 1970s through the 1990s already limiting the types of constitutional claims federal habeas courts could consider. For example, based on a Supreme Court decision, such courts had not been able to consider defendants' claims that law-enforcement officers had illegally searched or seized evidence used to secure convictions. After AEDPA, no matter what the underlying constitutional right, a federal court could only overturn a state conviction if it was clearly "contrary to" or "an unreasonable interpretation of" federal law. A state court that simply issued a wrong decision on federal law—so long as it was not unreasonable—could not be over-

the same time, despite repeated congressional requests over a period of years for complete statistics on how the PATRIOT Act has been used by the Justice Department, information available to Congress remains incomplete.

PARADIGMS LOST

Aggressive or humiliating interrogation is the most pointed example of counterproductive policy. If the most important issue we face in the treatment of a suspect who knows the location of a ticking bomb is "what balance" to keep between security and liberty, of course liberty will lose. Saving the lives of 3,000 innocents weighs far heavier in the balance than the rights of any one individual.

But how does aggressive interrogation improve security? Set aside the fact that the certainty of the ticking-bomb scenario never exists in the real world. When John Ashcroft argued that terrorists were trained to "use our freedoms against us," he pointed to an al-Qaeda training-manual instruction that terrorists, if captured, should lie in response to questions from authorities. However, neither the manual nor the attorney general explained how a denial of human rights can overcome the instruction to lie. Are terrorists less likely to lie if we humiliate them in violation of Geneva Convention protections—which we are, after all, bound to obey by law?

To the extent that the United States is able to answer this question—and compared with the counterterrorism expertise in Israel and the United Kingdom, our knowledge is limited at best—published accounts point to the opposite conclusion. As one Army interrogator put it in testimony related to the investigation of Abu Ghraib, "Embarrassment as a technique would be contradictory to achieving results." That is an important reason why the Army field manual has for decades instructed soldiers to avoid such tactics. They of course violate rights. They also do not reliably work. On the other hand, the widespread use and public revelation of such tactics has been powerfully effective in fueling anger and resentment that may feed anti-American terrorism for some time.

NOW COMPARE THESE TACTICS WITH SECURITY-enhancing measures that require essentially no balancing of security with human rights. For example, a bipartisan array of counterterrorism experts continues to criticize as inadequate inspection regimes for the 7 million cargo containers that arrive in U.S. ports each year—yet all acknowledge the danger of attack through such containers as a significant ongoing threat. The same may be said for the threat of bioterrorist attack, but the largely rights-neutral improvement of international public-health surveillance (which could help identify infectious-disease agents before they enter the United States) has also taken a backseat. And many in Congress have resisted entirely rights-neutral programs that would help the former Soviet Union secure stockpiles

NEWHOUSE NEWS SERVICE/LANDOV

Gag Rules: Security is always the justification for rights-limiting changes in criminal justice.

turned on habeas review. In the first years after its passage, AEDPA had a dramatic effect in accelerating the number of executions in the United States: Between 1996 and 1999, the number of prisoners executed annually in the United States more than doubled.

While obtaining relief from an unlawful conviction was becoming harder, it was becoming nearly impossible for prisoners to challenge unconstitutional conditions of detention. The Prison Litigation Reform Act of 1996 included a provision authorizing any prison official (or other party) to file a motion in court asking to end any existing court mandate that had required state officials to remedy unconstitutional prison conditions. If the federal court failed to respond to the motion within 90 days, the court's previous order (requiring, for example, measures to ensure adequate health conditions in prisons) would cease to have effect until the case was resolved. The Supreme Court narrowly upheld the legislation in 2000.

Post–September 11 legislative reforms have, of course, taken their own toll on the rights available to those caught up in the criminal-justice system. The PATRIOT Act has made it easier for law-enforcement officers to avoid Fourth Amendment warrant requirements in conducting physical and electronic searches. Material-witnesses statutes—long used to detain key witnesses to make sure that they did not disappear before testifying in a pending trial—are now used to hold individuals for lengthy periods, but without any of the constitutional protections afforded to criminal suspects. And prosecutions for the broad crime of providing "material support" to a terrorist organization have increased, risking incursions into legitimate rights of free association and speech.

After September 11 as before, the criminal-justice system remains among legislators' preferred vehicles for addressing social ills of all kinds.

—Deborah Pearlstein

of fissile material to prevent it from becoming available on the global black market. And on and on.

This is not to suggest that balancing security interests against liberty interests is never required. It is to emphasize that taking a stone away from the rights side of the scale does not necessarily give the security side an advantage any more than taking a stone away from the security side strengthens rights. It is to underscore that viewing the issue of security post–September 11 as an exercise where rights and security are opposed is likely to produce both poor security policy and rights-damaging results.

THE MORAL EQUIVALENT OF LAW

If escaping the balancing framework is important to making good judgments about security policy, it is essential to preserving a regime of human rights under law. The dangers of this have been acutely evident in the new U.S. approach to detention and interrogation. Since early 2002, the White House has insisted that the president has the power to designate American citizens "enemy combatants," and thereby deprive them of the constitutional protections of the U.S. criminal-justice system, or, indeed, any legal rights at all. More or less the same position has applied to the U.S. detention of thousands of foreign nationals held indefinitely in a global system from Iraq to Afghanistan to Guantanamo Bay.

As White House Counsel Alberto Gonzales put it in a speech defending the combatant-detention policy to the American Bar Association's Standing Committee on Law and National Security, at issue in these cases was "the balance struck by this administration between protecting our country and preserving our freedoms." This balance had to be struck by the chief executive as "a matter of prudence and policy"—not one fixed in some more permanent domestic or international framework of rights, or one unduly constrained by law. "You have to realize," the president's lawyer told the Supreme Court, "that in situations where there is a war ... you have to trust the executive to make the kind of quintessential military judgments that are involved" in interrogating detainees under U.S. control. This was not just about a particular entitlement—to a lawyer, to confidentiality, or to due process. This was about the idea of rights itself.

This argument took center stage this past spring when the Supreme Court heard its first three cases arising in the war on terrorism. In each of these cases—two involving the detention of U.S. citizens as "enemy combatants," one involving the detention of hundreds of foreign nationals beyond U.S. borders—the president argued that we should abandon reliance on law according to standards known to all and fixed in advance (the very definition of the rule of law) and move toward a more "flexible" anti-terrorism system where the rule of the road is not law but (in every case, at any moment) balance. Would an enemy-combatant detainee ever be able to assert his innocence to someone other than his interrogator? one justice asked during oral arguments. "As I understand it," the president's lawyer answered, "the plan on a going-forward basis, reflecting the unique situation of this battle, is to provide individuals like [Yaser Esam] Hamdi, like [Jose] Padilla, with the equivalent" of some review. "We don't know for sure."

By most accounts, the Court's decisions in these cases were a victory for human rights. In the case of U.S. citizen Hamdi, eight of the nine justices rejected the White House assertion that the president alone determined what rights Hamdi was entitled to receive. The federal courts will also have a role now in checking presidential power to detain foreign nationals at Guantanamo Bay. And while U.S. citizen Padilla may have to jump through additional procedural hoops, Hamdi's case put the handwriting for him on the wall: There would be no such thing as a rights-less citizen of the United States.

Nonetheless, these cases presented questions about government power and law that were staggeringly fundamental. And judging by the United States' ongoing detention of individuals in uncertain status around the world, and its ongoing resistance to allowing Guantanamo Bay detainees to challenge their detention in federal courts, the administration's basic position remains: Rules can be made "going forward"; on any given day, those rules may not be available for consideration by a court; and the rights available in each situation are "unique." In the rush to adjust the balance, we are abandoning the idea at the core of international human-rights law that some measures are fixed.

The basic balance between liberty and security in U.S. law was established centuries ago, when the United States had never been more vulnerable or less secure.

Conceiving our primary post–September 11 challenge as what balance to keep between liberty and security leaves us prone to see links between liberty and security where they need not exist, and prone to see rights under law as just another weight that can be readily removed from the scale. In fact, the basic balance between liberty and security in U.S. law was established in some detail centuries ago, at a time when the United States as an enterprise had never been more vulnerable or less secure. It included a commitment to the idea that people should be able to know in advance what the law is, and that if circumstances—like pressing new challenges to national security—required the laws to be changed, the people would have a say in how to change them. We have called that commitment the rule of law. And human rights are meaningless without it. ■

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Inalienable Rights

Can human-rights law help to end U.S. mistreatment of noncitizens?

BY ALISON PARKER

THE UNITED STATES, FAMOUS AS A nation of immigrants, should also be infamous for its bouts of anti-immigrant sentiment. Often our intolerance has been fueled by national-security fears.

At other times, Americans have made misguided assumptions about who immigrants are and the rights that protect them.

Foreigners in the United States illegally get a lot of publicity, but a substantial majority of noncitizens in America are here legally. They include permanent residents; people legally admitted for work, education, or tourism; refugees; asylum seekers; and people with temporary protected status. All of these noncitizens—including those here illegally—are guaranteed almost all the same rights as citizens. In fact, only three constitutional rights—voting in elections, holding certain political offices, and the absolute ability to enter and remain in the country—are denied noncitizens outright. Otherwise, the Constitution grants to "the people" or "persons"—not just to citizens—the rights to due process and equal protection of the law, to freedom of speech and assembly, and to freedom from arbitrary detention or cruel and unusual punishments.

International human-rights law uses much the same terminology to recognize these—and a few additional—rights of noncitizens. The parallels are no coincidence. When the nations of the world gathered together after the nightmare of Nazism to create the Universal Declaration of Human Rights, they looked to U.S. constitutional principles and the Bill of Rights for inspiration and guidance. The notion that all persons, whatever their legal status, have basic rights was then further elaborated in numerous international treaties.

In other contexts, the United States has a practice of limiting its human-rights obligations in the treaties it ratifies. But there are no such limits on immigrants' rights. None of the reservations and understandings the United States has entered for key treaties—including the International Covenant on Civil and Political Rights, the 1951 Refugee Convention, the Convention on the Elimination of Racial Discrimination, or the Convention Against Torture and Other, Inhuman or Degrading Treatment or Punishment—specifically limit noncitizens' rights.

On paper, constitutionally and internationally, Americans respect the rights of noncitizens. But inspiring words on a statue in New York Harbor notwithstanding, unadulterated welcome has never been our actual stance. From mid-19th-century attacks on Irish and German immigrant workers to legislated xenophobia in the Chinese Exclusion Act of 1882 to Japanese internment during World War II, the targets and expressions of hostility have shifted with the times. Since September 11, it is the 5.5 million persons of Arab or south Asian descent who are living under a pall of suspicion and resentment. Today the United States, which once motivated the world to take human rights seriously, must turn to the world's human-rights treaties to correct the mistreatment of the immigrants in our midst.

SLANDERED BY "SPECIAL INTEREST"

Immediately after 9-11, the U.S. government questioned thousands of noncitizens of Arab and south Asian descent who were selected for no reason other than their ethnic or religious backgrounds. A full 752 were arrested for routine immigration violations. While none was ever charged with terrorism, the government gave them the slanderous moniker of being of "special interest" to the terrorism investigation.

The special-interest detainees were subjected to secret immigration hearings where even their families were excluded. All endured periods of detention without charge. Thirty-six were held for 28 days or more, 13 were held for more than 40 days, and nine were held for more than 50 days—all without charge. One Saudi Arabian detainee was held for 119 days.

While detainees at one detention center in Brooklyn waited, correction officers slammed them against walls, causing pain and injuries. Other detainees had their fingers and wrists painfully twisted, or their restraints pulled to harm their legs and arms or to trip them so that they fell to the floor.

But even after they were charged with routine immigration violations (such as overstaying a visa) and ordered deported, the government continued to investigate them and to keep them jailed until it concluded they were not of interest. The government's assumption was that these noncitizens might be somehow linked to the 9-11 attacks. They were not. The special-interest detainees were treated like serious criminals when the worst they were ever charged with were run-of-the mill immigration violations.

UNFAIR DETENTIONS OF "WITNESSES"

Under the U.S. material-witness law, individuals can be detained if a judge decides that they are unlikely to appear at trial and that their testimony is material. But after 9-11, the

government used the law to detain at least 60 people, the majority of whom were noncitizens of Arab or south Asian descent, for the 9-11 grand juries while it interrogated and investigated them.

The government used appallingly circular logic when applying the material-witness law to noncitizens. First, the government alleged that noncitizens had some links to terrorism, often based on tenuous facts and assumptions about their religion and national origins. Without the supposition of guilt, these alleged witnesses could simply have been subpoenaed rather than incarcerated. Next, the government convinced judges that the witnesses had to be imprisoned because they were immigrants with relatives abroad and were at risk of fleeing the country. This was argued even when a witness was a legal immigrant, had lived here for several years with a spouse and children, and had voluntarily come forward to give information.

Many of the immigrants were never called to testify as witnesses. Instead, they were detained for months under punitive prison conditions. Some were questioned repeatedly without a lawyer present, and when their testimony changed, the government charged them with perjury.

Human-rights law prohibits detaining someone without charge or without carefully following the law (in this case, the material-witness law). U.S. law says the same, but in the post–9-11 atmosphere in the United States, courts were exceptionally deferential to the government's flawed assumptions.

DRACONIAN DEPORTATIONS

Well before 9-11, assumptions about immigrants tended to harm their rights. It was the 1995 bombing of the U.S. federal building in Oklahoma City—a crime committed by white U.S. citizens—that prompted Congress to pass anti-terrorism and death-penalty legislation in 1996, which also contained the most draconian immigration restrictions in our recent history.

While U.S. citizens convicted of crimes pay their debts to society and then return to their lives, under the 1996 laws, noncitizens with identical criminal records are deported after serving their sentences. Previously, legal long-term residents had the chance to tell a judge why they believed deportation would unfairly harm them and their families. But under the 1996 law, it doesn't matter how long noncitizens have lived in the United States, what their contributions to their community have been, or whether they have been rehabilitated. Legal permanent residents, U.S. military veterans, and adults who have been here since childhood and do not even remember their countries of origin have been treated as harshly under U.S. immigration law as undocumented immigrants who have committed violent crimes.

For example, 8-year-old Brazilian Joso Herbert became the adopted son of an American family in 1987. Two months after his graduation from high school in 1997, he sold 7.5 ounces of marijuana to a police informant. Because he was a first-time offender, he was sentenced to probation and community service. But then he was deported to Brazil—a place where he knows no one and where he no longer understands the language.

Despite their drastic nature, deportations can occur after proceedings in which immigrants have no lawyer to help them; because deportation is considered a civil matter, it does not trigger the Fourth Amendment right to counsel. This is particularly unfortunate because Congress decided to make the laws retroactive, and an immigrant may now face deportation for a crime he or she pleaded guilty to years ago when it carried no such consequence. Moreover, the new laws expanded the crimes that prompt deportation to include even minor misdemeanor offenses, e.g., violations of drug-paraphernalia laws. In the nine years the laws have been in place, 258,112 noncitizens have been deported for crimes.

These deportations are ripping apart American families and violating the human right to family unity. About one in every 10 children in the United States lives in a family that includes citizen and noncitizen members. Today, if a noncitizen parent faces deportation for a crime, he or she may not even have a chance to argue before a judge that removal from the United States equals separation from a U.S. citizen child.

LOST WAGES

All of the immigrant workers in the United States, whether here legally or not, have the same international labor rights as U.S. citizens. As the Inter-American Court of Human Rights has noted, "If undocumented workers are contracted to work, they immediately are entitled to the same rights as all workers." As workers, for example, they have the right to organize and to a remedy if illegally fired. U.S. state and federal courts confirmed this view of the rights of workers up until 2002.

McDAVID HENDERSON

But in 2002, the U.S. Supreme Court's *Hoffman Plastic Compounds Inc. v. National Labor Relations Board* decision told undocumented workers that while their work is accepted, their basic human rights are not. The *Hoffman* decision stripped some 12 million undocumented workers of their ability to receive back pay for lost wages if they are illegally fired for organizing. The possibility of having to provide back pay has been a significant deterrent to employers seeking to squelch union organizing efforts by firing pro-union workers. But the Court said that immigration policy and labor law were in conflict, and that immigration law trumps laws intended to protect workers' rights.

Before *Hoffman*, unions could tell all workers that they need not fear employer retaliation for organizing because they would not lose wages due to them if they were illegally thrown off the job. Now, employers can take full advantage of the work of illegally present immigrants and then, if they stand up for their rights, fire them with impunity.

However, other labor rights of noncitizens, such as the right to a safe workplace and to compensation for injuries, are recognized in both international and U.S. law. After *Hoffman*, these rights remain in force, and U.S. courts and administrative tribunals are open to protect them. The problem is that noncitizens are afraid to vindicate their rights because they fear the immigration consequences of complaining. Legal or illegal, they do not want to end up in an immigration court.

DENIED DUE PROCESS

Immigrant workers, indeed all noncitizens, have cause to fear immigration courts. Well before September 11, throughout the 1980s and '90s, U.S. immigration hearings were often marred by procedural failings that violated both constitutional and human-rights law. Immigrants weren't informed of their right to hire an attorney, interpreters were badly prepared or nonexistent, and some noncitizens were never notified of the case or charges against them.

Haitian asylum seekers have been interdicted at sea, where the United States claims it has fewer obligations, and denied their human right to fair and efficient asylum procedures. The Haitians were rushed through cursory hearings, if they received them at all, on board hot and overcrowded ships, without privacy, and with their testimony poorly translated.

The 1996 laws brought a new onslaught of substantive due-process problems. Besides mandating deportation for even minor criminal convictions, they subjected newly arrived refugees fleeing persecution in their home countries to mandatory detention. Asylum seekers were previously granted parole, which made it easier for them to access a lawyer, adjust psychologically, and prepare their cases. Now refugees have a slim chance of leaving prison before their cases are finally decided. They can wait months, sometimes years, before they are released.

A WIDENING NET

Three years after al-Qaeda's attacks, the United States is continuing to cast a wide and disparaging net over noncitizens, both at home and abroad. U.S. consular officials abroad have instituted elaborate screening procedures for visa applicants and refugees selected for resettlement in the United States. Instituting security checks on visa applicants may make sense for national security, but refugees who have already had their cases assessed and who are, by definition, fleeing for their lives should be placed in a speedier queue because the United States has a special international obligation to protect them.

At home, the Department of Homeland Security has decided to subject every noncitizen within 160 miles of the Mexican or Canadian borders to "expedited procedures" (meaning less due process) to determine whether they are legally present. If not, they will be immediately deported without a hearing.

The new policy raises questions about the training and capacity of border agents to assess the legal status of noncitizens and to effectively and fairly identify those who risk persecution in their home countries. A United Nations report leaked to *The New York Times* in August 2004 revealed that similar expedited procedures, in place at U.S. airports since 1997, have resulted in some asylum seekers being harassed and intimidated, discouraged from seeking asylum, and interviewed without translators by airport inspectors who lacked knowledge of asylum law.

NO RIGHT TO ENTER

All around the world, diverse factors, from conflict to international business, are prompting people to cross borders and start life anew in a country other than their own. As a result, governments are confronted each day with the question of what rights they must guarantee to noncitizens.

As much as they'd rather not admit it, world leaders settled that question long ago. Governments realized early on that the best way to make sure that their citizens were treated well abroad was to sign reciprocal treaties with other governments promising to treat foreigners fairly. Emmerich de Vattel, the most influential international-law scholar in the early days of the United States, wrote that "denial of justice" to aliens would justify their home country's decision to begin a war of reprisal against the United States. This is why international human-rights treaties are almost entirely blind to the citizenship status of the people they protect.

Many politicians fear that respecting immigrants' human rights will require granting them a broad or poorly policed "right to enter." September 11 has only redoubled those fears. But an absolute right to enter is not what the international human rights of immigrants are about. Rather, they are about treating all human beings fairly and without discrimination. Americans in particular should look toward international human-rights laws because they compel us to strive toward becoming what, as a nation of immigrants united on behalf of freedom and democracy, we claim that we already are. ■

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Holding America Accountable

Why the United States should take human-rights obligations seriously

BY ELISA MASSIMINO

ELEANOR ROOSEVELT, THE MOTHER OF THE INTERNATIONAL HUMAN-RIGHTS movement, famously said: "Where do universal human rights begin? In small places, close to home. So close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works."

The human-rights treaties to which the United States is a party—on civil and political rights, torture, and racial discrimination—are intended to protect people "close to home" against government abuses of their rights. But most Americans have never heard of them. Neither have the domestic agencies that have—or ought to have—protection of these rights as part of their mandate. In the United States, human-rights matters begin—and largely end—in the State Department, where they are treated as a matter of foreign policy.

Perhaps the only welcome consequence of the Abu Ghraib prison scandal is that more Americans have now heard of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. But they may well conclude that the treaty's main purpose is to protect unfortunate victims abroad and has nothing to do with them. Even more shocking than the brutality depicted in the Abu Ghraib photographs were the memorandums written by administration lawyers that tried to justify the conduct and create a legal theory to defend those caught in the act. These memos confirm what's been obvious to many since the early days of the administration: its deep cynicism toward international obligations and its shallow commitment to human rights.

The roots of this cynicism, though, stretch back farther than the current administration. The manner in which the United States undertakes these human-rights obligations in the first place reveals much about the place they hold in American law.

When the executive branch asks the Senate to ratify a human-rights treaty, it sends a companion package of reservations, understandings, and declarations designed to ensure that the treaty effects virtually no change in domestic law and practice. Lawyers at the State Department, with some help from the Department of Justice, go through the treaty's provisions, comparing its requirements to state and federal law and practice. If there is any conceivable contradiction, the United States exempts itself from compliance. For provisions where there's no outright contradiction, the United States complies only to the extent that the treaty is congruent with, but not broader than, existing U.S. law. Then, just for insurance, the United States declares that the treaty is "non–self-executing," to avoid having the treaty create private rights enforceable in U.S. courts.

In the rare instance where a treaty absolutely requires changing domestic law, the United States has found ways to limit and pervert that implementation. In the case of the torture convention, for example, signatories are required to explicitly outlaw torture. So, although the Senate ratified the treaty in 1991, it took three years for Congress to pass a statute simply declaring torture to be a crime. Why? Because some members of Congress persisted in amending the anti-torture bill to add a death penalty. This prompted those who otherwise would have supported the bill to oppose it. Round and round it went until 1994, when the bill was finally passed, outlawing torture and setting a maximum penalty of life in prison. U.S. ratification of the treaty took effect; the human-rights community had a party. And, six months later, Congress amended the law to add back in the death penalty.

The law criminalizes torture, but only when it is committed outside the United States. Existing criminal laws—against assault and battery, murder and manslaughter, kidnapping and abduction, false arrest and imprisonment, sexual abuse, and violation of civil rights—were considered at the time sufficient to cover any act constituting torture. That's why the police defendants in the 1997 torture of Haitian immigrant Abner Louima in New York were charged not with torture but with violating his civil rights. But the current administration now relies on that jurisdictional limitation to argue that the Abu Ghraib abuses, because they took place in U.S.–occupied territory, are exempt from prosecution under the federal anti-torture statute. As Attorney General John Ashcroft testified in June, it's Congress' fault. "When the Congress enacted the torture statute," he said, "it enacted a law that said it applied everywhere outside the United States. But when the Congress defined the United States, it's not simple: It will sometimes include military bases, it will sometimes include consular offices, it will sometimes include the residences or embassy offices. And when the Congress of

the United States makes these definitions, that's what I have to live by." Of course the treaty's ban on torture applies no matter where the conduct occurs, but Ashcroft's argument underscores the need to amend the anti-torture statute so that there are no gaps in criminal jurisdiction. Torture inside the United States is still torture.

Some treaty rights can be restricted in times of emergency that "threaten the life of the nation." (However, the right to be free from torture is not among these.) The International Covenant on Civil and Political Rights includes a process under which countries can suspend certain rights, such as the right to be free from arbitrary arrest, and the right to a speedy trial, guaranteed in Article 9 of the covenant. Britain, whose new anti-terrorism law authorizes violation of these rights, has entered such a "derogation" with the United Nations. Shortly after President Bush issued the order authorizing military trials of noncitizens, I was meeting with senior human-rights officials at the State Department. I asked them whether they had taken steps to derogate from Article 9 of the treaty on civil and political rights. It was clear that they hadn't considered the question at all. The idea that these treaty obligations might in any way constrain U.S. action simply hadn't occurred to them.

Clinton created a structure to integrate human rights into the domestic-policy mainstream. But under the Bush administration, the experiment has withered.

IT DOESN'T HAVE TO BE THIS WAY. THERE ARE OTHER models of treaty ratification and implementation that take these obligations seriously and weave them into the fabric of domestic law and practice, through the political process and by public education. When Canada considers a treaty, for example, it engages in a lengthy process of consultation; provinces are invited to identify possible reservations to the treaty where it conflicts with local law. The process is used both to get buy-in from the provinces and to educate local officials about the treaty's requirements. Once ratified, jurisdiction over the treaty's implementation and monitoring shifts to Canada's department of justice, which deals with individual complaints about violations and vets proposed legislation for conformity. Australia, meanwhile, reaches out to its states through its Human Rights Working Group of the Standing Committee of Attorneys General; the Parliamentary Standing Joint Committee on Treaties in the federal parliament holds public hearings.

Suppose the United States decided to take these obligations seriously. What if, instead of the cynical process we have now, it went like this: The president decides its time to ratify the covenant on civil and political rights, but there's a prohibition on juvenile execution, and many states in the United States still execute juvenile offenders. The president's lawyers thus draft an exemption clause, preserving the right of the United States to execute children, but the president asks them to draft legislation banning juvenile execution for Congress to consider alongside the reservation. Congress then chooses among implementing the treaty through legislation, ratifying it with reservations, or holding off on ratification until the law can be changed to conform to the treaty.

Sound crazy? President Clinton broke new ground in this direction with his 1998 Executive Order 13107 on the Implementation of Human Rights Treaties, issued on the 50th anniversary of the Universal Declaration of Human Rights. If the Universal Declaration is the birth certificate of the human-rights movement, Executive Order 13107 is its diploma. The order created a structure designed to break the monopoly of the State Department on human rights and bring these obligations into the mainstream of the domestic agencies with primary jurisdiction over their subject matter.

The order also created an Interagency Working Group with broad membership and an expansive mandate to prepare treaty compliance reports to the United Nations; respond to complaints about human-rights violations; vet proposed legislation for conformity with treaty requirements; monitor and analyze state law and practice on human rights; educate the public about human rights; and conduct a yearly review of all U.S. reservations, understandings, and declarations to see whether they can be withdrawn or whether U.S. law should be altered to make them unnecessary.

The working group was in operation for two years. It made slow progress, primarily with officials from the Justice Department, the Department of Health and Human Services, and other domestic agencies who were initially reluctant—and confused—participants. Over time, though, through a process of education and shifting bureaucratic incentives, the working group began to change the way domestic agencies viewed their relationship to these treaties and created a structure to integrate human rights into the domestic-policy mainstream.

But the experiment was over before it really got off the ground. Under the Bush administration, the working group has withered, and human rights are back behind the State Department's fence.

This year, the United States is due to report to the United Nations on compliance with the torture convention. It will be only the second time in the 10 years since ratification that the United States has had to engage in this self-examination process. Its first report, filed in 1999, began with the words, "Torture does not occur in the United States except in aberrational situations and never as a matter of policy." What will the report say this time? ■

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On America's Double Standard

The good and bad faces of exceptionalism

BY HAROLD HONGJU KOH

WHEN THE UNITED STATES HOLDS TALIBAN detainees at Guantanamo Bay, Cuba, without Geneva Convention hearings, then decries the failure of others to accord Geneva Convention protections to their American prisoners, it supports a double standard. When George W. Bush tries to "unsign" the International Criminal Court (ICC) treaty that Bill Clinton signed in 2000, yet expects other nations to honor signed treaties, he does the same. When U.S. courts ignore an International Court of Justice decision enjoining American execution of foreign nationals, even as we demand that other countries obey international adjudications that favor American interests, the United States is using its vast power and wealth to promote a double standard. In these and other instances, the United States proposes that a different rule should apply to itself than to the rest of the world.

U.S. officials say that they must act to protect our security and to avoid unacceptable constraints on national prerogative. But to win the illusion of unfettered sovereignty, they are actually undermining America's capacity to participate in international affairs.

Over the past two centuries, the United States has become party not just to a few treaties but to a global network of closely interconnected treaties enmeshed in multiple frameworks of international institutions. Unilateral administration decisions to bend or break one treaty commitment thus rarely end the matter; rather, they usually trigger vicious cycles of treaty violation. Repeated insistence on a double standard creates the damaging impression of a United States contemptuous of both its treaty obligations and its treaty partners, even as America tries to mobilize those same partners to help it solve problems it simply cannot solve alone—most obviously, the war against global terrorism, but also the postwar construction of Iraq, the Middle East crisis, and the renewed nuclear militarization of North Korea.

HISTORICALLY, AMERICAN ADMINISTRATIONS HAVE tended to distance and distinguish themselves from the rest of the international community; human-rights advocates have often condemned this "American exceptionalism." But while the promotion of double standards is indeed corrosive, not all forms of exceptional American behavior are equally harmful.

America's distinctive rights culture, for example, sometimes sets it apart. Due to our particular history, some human rights, such as the norm of nondiscrimination based on race or First Amendment protections for speech and religion, have received far greater emphasis and judicial protection in the United States than in Europe. But our distinctive rights culture is not fundamentally inconsistent with universal human-rights values.

Nor is America genuinely exceptional because it sometimes uses different labels to describe synonymous concepts. When I appeared before the UN Committee Against Torture in Geneva, Switzerland, to defend the first U.S. report on U.S. compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, I was asked the reasonable question of why the United States does not "maintain a single, comprehensive collation of statistics regarding incidents of torture and cruel, inhuman or degrading treatment or punishment," a universally understood concept. My answer, in effect, was that we applied different labels, not different standards. The myriad bureaucracies of the federal government, the 50 states, and the territories *did* gather statistics regarding torture and cruel, inhuman, or degrading treatment, but we called that practice different things, including "cruel and unusual punishment," "police brutality," "section 1983 actions," applications of the exclusionary rule, violations of civil rights under color of state law, and the like. Refusing to accept the internationally accepted term reflected national quirkiness, somewhat akin to our continuing use of feet and inches rather than the metric system.

A third form of American exceptionalism, our penchant for non-ratification (or ratification with reservations) of international treaties, is more problematic—but for the United States, not for the world. For example, it is a huge embarrassment that only two nations in the world—the United States and Somalia, which until recently did not have an organized government—have not ratified the international Convention on the Rights of the Child. But this is largely our loss. In no small part because of its promiscuous failure to ratify a convention with which it actually complies in most respects, the United States rarely gets enough credit for the large-scale moral and financial support that it actually gives to children's rights around the world.

In my view, by far the most dangerous and destructive form of American exceptionalism is the assertion of double standards. For by embracing double standards, the United States invariably ends up not on the higher rung but on the lower rung with horrid bedfellows—for example, such countries as Iran, Nigeria, and Saudi Arabia, the only other nations that have not in practice either abolished or declared

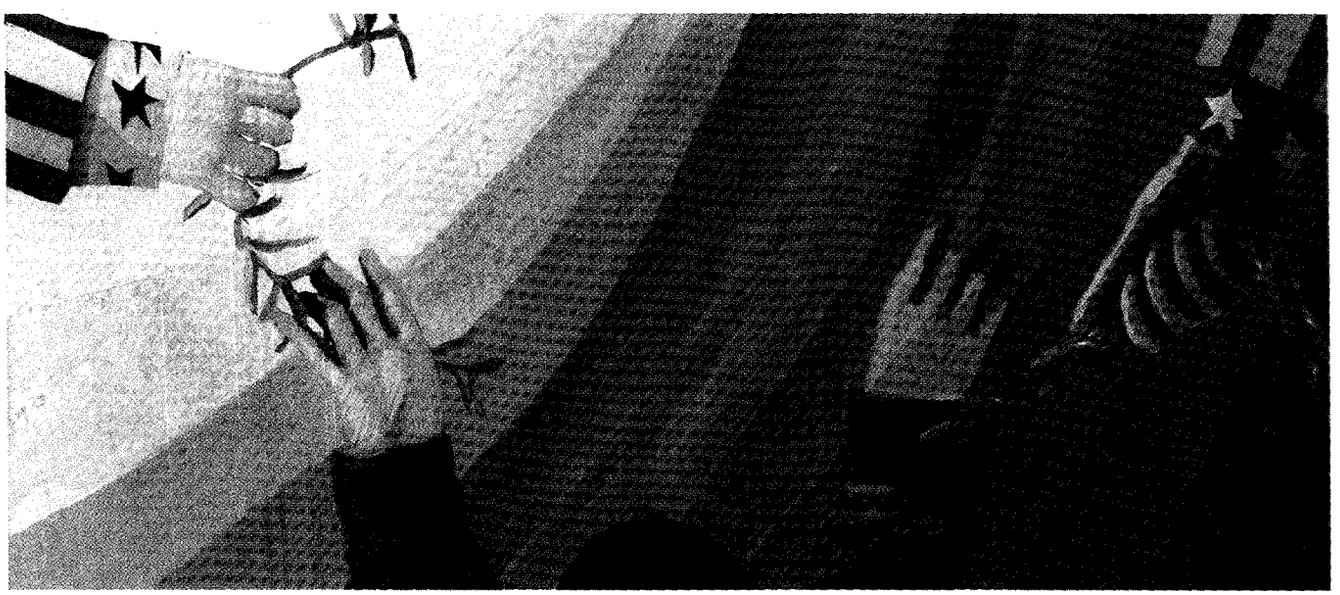
a moratorium on the imposition of the death penalty on juvenile offenders. This appearance of hypocrisy sharply weakens America's claim to lead globally through moral authority. More important, by opposing global rules in order to loosen them for our purposes, the United States can end up—as it has done with the Geneva Conventions—undermining the legitimacy of the rules themselves, just when we need them most.

DOUBLE STANDARDS ARE THE NEGATIVE FACE OF American exceptionalism. There is, however, another, much-overlooked dimension in which the United States is genuinely exceptional in international affairs: namely in its exceptional global leadership and activism. Experience teaches that when the United States leads on human rights, from Nuremberg to Kosovo, other countries follow. When the United States does not lead, often nothing happens—or, worse yet, as in Rwanda and Bosnia, disasters occur because the United States does not get involved.

Let me illustrate with an anecdote from my childhood, the story that made me want to be a human-rights lawyer. My late father, Kwang Lim Koh, served as minister to the United States for the first democratically elected government in South Korea. In 1961, a military coup overthrew the democratic government of Prime Minister Chang Myon, who was placed under house arrest amid rumors that he would shortly be executed. To plead for Chang's life, my parents brought his teenaged son to see Walt Rostow, then the deputy national-security adviser to the president. As my father recalled, Rostow turned to the boy and told him simply, "We know where your father is. Let me assure you, he will not be harmed."

Rostow's words stunned my father, who simply could not believe that any country could have such global power, reach, and interest. It was only after I entered the State Department that I saw that what I had thought had been exceptional behavior is, in fact, standard American diplomatic practice. Yet ironically, as I grew older, I came to realize that this canonical story was inherently double-edged. The United States was ready to intervene to save Prime Minister Chang's life, but not to take the additional steps necessary to restore democracy in South Korea. Instead, for several decades, the United States supported a military government that achieved political stability through authoritarian rule, a story that became all too familiar throughout the Cold War era.

What this taught me is that human-rights problems often arise when the United States does *not* exercise its exceptional leadership in human rights. If critics of American exceptionalism too often repeat, "America is the problem, America is the problem," they will overlook the occasions where America is not the problem, it is the solution—and if America is not the solution, there simply won't be a solution.



RICHARD HENDERSON

CONSIDER AFGHANISTAN, TO CITE JUST ONE EXAMPLE. In 2002, the United States led an extraordinarily swift and successful military campaign to oust the Taliban so that a democracy could be created in Afghanistan. But what then? In Bosnia, the United States famously "went in heavy" after the Dayton Accords, supporting the entry of 60,000 NATO peacekeepers, including some 20,000 Americans. But in Afghanistan, a significantly larger geographical area, the United States has committed fewer troops to peacekeeping and called for only a small fraction of the international peacekeepers that were sent to Bosnia. The predictable result: While Hamid Karzai nominally acts as president of Afghanistan, outside of Kabul, much of the country remains under the de facto control of warlords and drug lords. Yet instead of making the additional financial commitments necessary to secure Afghanistan and promote serious nation building, the administration initially allocated *zero* dollars in its 2004 budget for Afghan reconstruction (until embarrassed congressional staffers finally wrote in a paltry line item of $300 million to cover the oversight). To date, U.S. and other international donors have advanced less than half the sums they originally pledged for Afghan reconstruction.

In this case, as in others, my policy prescriptions may be controversial, but my broader point should not be: American exceptionalism has both good and bad faces, and we should be aware of both. The greatest tragedy is when America's "bad exceptionalism," its support for double standards, undermines its ability to engage in "good exceptionalism," or exceptional human-rights leadership.

THE BUSH ADMINISTRATION'S RESPONSE TO POST–September 11 fears—the Bush doctrine, if you will—has been to institute sweeping strategies of law enforcement, immigration control, security detention, and governmental secrecy at home while abroad asserting a novel right under international law to force the disarmament of any country that poses a gathering threat, a right to preemptive self-defense if necessary.

Moreover, instead of declaring a state of emergency or announcing broadscale changes in the rules by which the United States had previously accepted international human-rights standards, the administration has opted for an extralegal strategy. It has sought to create both extralegal zones, most prominently at Guantanamo Bay, where scores of security detainees are held without legal recourse, and extralegal persons, particularly those detainees labeled "enemy combatants," whom, even if American citizens on American soil, the administration has sought to accord no recognized legal avenue to assert either substantive or procedural rights.

What makes the emerging Bush doctrine so troubling is that it makes double standards—the most virulent strain of American exceptionalism—not just the exception but the rule. Even while asserting its own right of preemptive self-defense, the United States has properly hesitated to recognize any other country's claim to engage in forced disarmament or preemptive self-defense in the name of homeland security (think North Korea, for example). The technique of designating extralegal "rights-free" zones and individuals under U.S. jurisdiction necessarily erects a double standard *within* American jurisprudence, separating those people to whom America must accord rights from those it may treat effectively as human beings without human rights.

Similarly, the oxymoronic concept of "imposed democracy" authorizes top-down regime change, even though the United States has always argued that genuine democracy must flow from the will of the people, not from a military occupation.

If the emerging Bush doctrine takes hold, the United States may well emerge from the post–9-11 era still powerful but deeply committed to double standards as a means of preserving U.S. hegemony. Yet this would represent the very antithesis of America's claim, since the end of World War II, to apply *universal* legal and human-rights standards. The real danger of the Bush doctrine is thus that it will turn the United States, which since 1945 has been the major architect and buttress of the global system of international law and human rights, into the system's most visible outlier. This can only weaken human-rights institutions and reduce their capacity to promote universal values and protect American interests.

GIVEN THIS DIAGNOSIS, WHAT DO WE DO ABOUT IT? My answer: We should use "transnational legal process" to press our government to put forward the best face of American exceptionalism, the activist face that promotes human rights and the rule of law.

Transnational legal process encompasses the interactions of public and private actors—nation states, corporations, international organizations, and nongovernmental organizations—in a variety of forums to make, interpret, enforce, and ultimately internalize rules of international law. In my view, it is the key to understanding why nations obey international law. Under this view, those seeking to create and embed certain human-rights principles into international and domestic law should trigger transnational interactions, which generate legal interpretations, which can in turn be internalized into the domestic law of even resistant nation states.

For more than half a century, the United States has promoted international criminal adjudication as being in our national interest. But not the Bush administration.

Let me illustrate my approach with the example of a system under stress after September 11: the global justice system for adjudicating international crimes. With the trial of Slobodan Milosevic, the Yugoslav tribunal faces its make-or-break case. The Rwanda tribunal has been singularly unsuccessful. For a time, the United Nations pulled out of the Cambodia tribunal, and the Sierra Leone tribunal has yet to decide any case. Academic commentators and some judges have started to challenge the rise of human-rights litigation in U.S. courts.

With the global justice system teetering, enter the Bush administration. The new administration could have chosen a strategy of support for the global justice system, or of selective engagement to encourage it in certain directions, or even of benign neglect (an approach that Colin Powell initially seemed to prefer).

But instead, the Bush administration has opted, with four decisive measures, to place itself outside the global justice system and pursue a hostile course. First, the United States announced that it would cease funding the Yugoslav and Rwanda tribunals by 2008, thus giving every defendant currently before the tribunals an incentive to stall until then. Second, the administration purported to erase President Clinton's signature of the ICC treaty. Third, the administration vetoed extension of the UN law-enforcement assistance mission in Bosnia until the UN Security Council granted a one-year exemption from ICC jurisdiction for all U.S. officials engaged in peacekeeping operations. Fourth, the United

States has brought certain foreign terrorist suspects for war crimes not before the international court but before ad hoc domestic military commissions.

Yet for more than half a century, the United States has promoted international criminal adjudication as being in our long-run national interest. This policy has stemmed from a sensible prediction that, on balance, the United States is far more likely to act as a plaintiff than as a defendant before these tribunals, and thus has much more to gain than to lose from their effective functioning. Bosnia, for example, taught that indictment alone can be a valuable political tool. Although two of the leading architects of ethnic cleansing in Bosnia, Radovan Karadzic and Ratko Mladic, have not yet been brought to trial, their indictment before the Yugoslav tribunal has effectively removed them from political life, creating space for more moderate political forces to emerge.

In addition, in many cases, supporting global adjudication has served U.S. national interests by sparing us from far more costly military interventions. Our support for the Yugoslav tribunal helped the United States avoid sending troops to Belgrade to seize and oust Milosevic.

From the start, the Iraq War underscored America's shortsightedness in rejecting a permanent standing international criminal court. As the war began, both Bush and Donald Rumsfeld announced that high-ranking Iraqi war criminals, including Saddam Hussein, would be prosecuted. Yet by bringing Hussein before an Iraqi, not an international, court, they have marred his prosecution with a taint of victor's justice.

In such circumstances, how could transnational legal process help? In several ways. Those who support eventual U.S. participation in the ICC could provoke interactions between the U.S. government and the ICC with an eye toward demystifying the court's processes and gradually convincing U.S. officials that the ICC actually serves U.S. interests.

Meanwhile, human-rights groups, recognizing that the ICC is far more likely to survive if the United States sees it as helpful rather than hostile to its foreign-policy interests, could press toward the same end. ICC supporters should seek to identify cases that the new prosecutor, Luis Moreno Ocampo, could bring before the ICC as a way of illustrating both the court's responsibility and its political usefulness. By winning convictions and obtaining domestic compliance, he would also begin the process of embedding ICC decisions in the domestic law of various target nations, in the same way European Court of Human Rights rulings have now become deeply internalized in the law of member states.

In addition, transnational legal process could be used to erode the force of the novel U.S. tactic of unsigning the ICC treaty. Every act of U.S. cooperation with the ICC would constitute a de facto repudiation of the attempt to unsign. Thus, in a well-chosen case, a state party to the court could request that the United States provide evidence to support an ICC prosecution or that it extradite to the ICC a suspect located on U.S. soil. If the United States were to cooperate—as it well might in a case that served U.S. interests—the incident would begin to undermine the claimed unsigning.

AT THE HEIGHT OF THE IRAQ WAR, THE GROWING discrepancy between America's hard and soft power had become painfully clear. Even as the United States was using stunning military technology to bomb Baghdad, it could not diplomatically secure the Security Council votes of even its closest allies on a matter that the president deemed of highest national importance. Administration officials railed against egregious Iraqi violations of the Geneva Conventions, seemingly unaware that much of the world had already concluded that the United States was flouting the Geneva Conventions at Guantanamo Bay (and tragically, as we later learned, at Abu Ghraib). The president called for prosecution of Iraqi war criminals, without relenting in his opposition to the ICC. And U.S. officials, who spoke only days before about the irrelevance of the United Nations to the launching of our attack, spoke confidently about their expectation that the United Nations would nevertheless authorize the lifting of sanctions and support the massive effort necessary to clean up and build a democratic postwar Iraq.

Left unrestrained, it seems clear, a continuing impulse to adopt double standards will continue to weaken American soft power and damage the rule-of-law structures that America has helped put in place. Double standards diminish American sovereignty.

Yet at the same time, an array of institutions—Congress, the courts, the executive bureaucracy, the media, intergovernmental organizations, and the American public, as well as foreign governments, nongovernmental organizations, and citizens—can work together to mitigate these impulses.

As this war on terrorism wears on, a transcendent issue in the debate over U.S. foreign policy will be what kind of world order is emerging, and what America's role in it will be. After September 11, the United States no longer has the option of isolationism. Like it or not, Americans must be internationalists, but we do have a choice as to what version of internationalism we will pursue. Will it be power-based internationalism, in which the United States gets its way because of its willingness to exercise power, whatever the rules? Or will it be norm-based internationalism, in which American power derives not just from hard power but from perceived fidelity to universal values of democracy, human rights, and the rule of law?

As a nation conceived in liberty and dedicated to certain inalienable rights, the United States has strong primal impulses to respond to crisis not just with power alone but with power coupled with principle. After September 11, our challenge is to prod the country we love to follow the better angels of its national nature. ■

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The Partial Rule of Law

America's opposition to the ICC is self-defeating and hypocritical.

BY ANNE-MARIE SLAUGHTER

SLOBODAN MILOSEVIC IS IN THE dock for war crimes, crimes against humanity, and genocide. For all the delays and procedural maneuvering, his trial marks a milestone in the extraordinary development of international criminal law from Nuremberg forward. In addition to the International Criminal Tribunals for the Former Yugoslavia and Rwanda, tribunals composed of national and international judges are operating in East Timor and Sierra Leone and being negotiated in Cambodia. And, if all goes as planned, Saddam Hussein will soon be tried in Iraq, by his own people, for national and international crimes.

From the role of U.S. Supreme Court Justice Robert Jackson at Nuremberg to U.S. leadership in creating and funding the Yugoslavia and Rwanda tribunals, the United States has been the indispensable nation in holding others to account. We have been the prime mover in transforming state liability into individual liability, a trend that will ultimately reshape the core premises of international law.

For the peoples of the world, however, and for many Americans, this proud record has been almost completely overshadowed by the almost visceral U.S. opposition to the International Criminal Court (ICC). We have not only rejected the treaty but have also carved out a zone of immunity for U.S. soldiers in every country with which we have decent relations. Congress even passed a statute that actually authorizes the U.S. military to invade The Hague to rescue any U.S. soldier (or soldier from any allied country). This has come to be known in many corners as the "Hague Invasion Act," occasioning an angry debate in the Dutch parliament and producing sarcastic media scenarios about Delta Force storming Dutch prisons.

It is tempting to pin this opposition on the Bush administration. The effort to destroy the ICC has certainly resonated far more with the right. But President Clinton made only one public speech in support of the court, before it was negotiated. He signed the Rome Treaty only at the literal last hour. No member of Congress has come to its defense. And in the negotiations, we held out for nothing less than exemption.

Milosevic in the dock

SO WHEN EXACTLY DID THE AMERican conception of the rule of law come to mean one set of rules for others and another for ourselves? Somewhere around the time that we became afraid of the world, afraid to lead by example rather than by diktat.

The administration's opposition to the ICC, reflected in the Clinton administration's negotiating position (at the Pentagon's behest), was that we could not possibly risk having American soldiers tried anywhere but in American courts. We thus held out for, and won, the principle of complementarity, which grants jurisdiction over any defendant first to the courts of his or her own country.

Suppose that we had joined the ICC and were subject to its jurisdiction when the news broke of the crimes committed by U.S. troops at Abu Ghraib. Another ICC signatory could refer the case of these crimes to the ICC prosecutor, or the prosecutor could choose to investigate them on his or her own motion. But it would fall first to the U.S. military-justice system to investigate and try those responsible, as indeed we are doing.

The difference is that the U.S. government would have to demonstrate to the world—including, of course, to the American people—that it was both able and willing not to whitewash or ignore the crimes, and not to try only a few scapegoats if the trail of guilt led higher up the chain of command. This is just what the Pentagon claims to be doing.

So what is the problem? Why are we afraid to hold up our institutions as examples, to submit ourselves to the same rules we apply to others? Why can't we be confident that our own domestic political institutions will compel our military to do the job right? After all, the British are willing—even when they are siding with us in an extremely unpopular global war. They do so precisely because of their own commitment to the rule of law, the commitment that is a foundational part of our common political heritage.

We are afraid "because they hate us." But reactions born of fear, and the accompanying determination to stand apart, help make such hatred a self-fulfilling prophecy.

Many liberals, including former policy-makers, don't get the significance of the ICC. They dismiss it as a specialist issue, of concern mainly to human-rights activists and international lawyers. But it is much more than that in the rest of the world. It is a tangible symbol of American hypocrisy. For a self-proclaimed champion of human rights and the rule of law, that is a serious problem. ■

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Shame in Our Own House

How segregation and racism have fed U.S. resistance to international human-rights treaties

BY GAY McDOUGALL

IN ITS RELATIONS WITH THE REST OF THE WORLD, AMERICA STRUGGLES WITH A profound contradiction. On the one hand, our country has been a pioneer in the human-rights movement, providing much of the language and inspiration for international efforts to win equality for all. On the other hand, our government has repeatedly blocked attempts to bring these rights home to America's own racial minorities, and that hypocrisy lurks at the core of our moral identity as a nation, undermining our claims to global leadership.

The roots of the problem run deep. Since the country's inception, when the Founding Fathers decided to build a rights-based government on the foundation of slavery, the commitment to grant basic human rights to some, but not all, citizens has bedeviled our nation. Along with the legacy of racism itself, we are still contending with institutions originally established to preserve slavery. It was a compromise reached at the Constitutional Convention in 1787, which gave southern slave states disproportionate power in the U.S. Senate; in the years following, influential southern senators were able to block every anti-slavery measure passed by the House of Representatives, terminate Reconstruction, and, until 1957, obstruct all civil-rights legislation. The power of southern senators has also been used to ensure that America's engagement in the world posed no threat to its discriminatory practices at home. That purpose, like the compromise in 1787, met the interests of a broader constituency than just the South.

No historical period demonstrates the resulting clash of policy—the simultaneous promotion of human rights and rejection of racial equality—better than the era of the United Nations' founding. The end of World War II created an opportunity for the United States to position itself as not only the military leader but also the moral leader of the world. Eleanor Roosevelt became one of the principal drafters of the Universal Declaration of Human Rights, the document that first created the legal framework for the international human-rights movement. Americans promoted the creed of democracy, freedom, and human dignity around the world.

At the same time, African American leaders were intensifying their appeals to the international community to redress the damage done by more than three centuries of slavery, Jim Crow, and racism. Americans such as Walter White and W.E.B. DuBois of the NAACP, Mordecai Johnson of Howard University, and Mary McLeod Bethune, founder of the National Council of Negro Women, participated as activist-observers at the Dumbarton Oaks and San Francisco conferences that gave birth to the United Nations. There they joined oppressed and colonial peoples from around the world in lobbying the "great powers" to include guarantees of fundamental human rights in the UN Charter.

But the U.S. government balked at that. The American delegation was wary of the implications such standards would have for racial equality at home. U.S. Delegate Tom Connally, a senator from Texas, opposed even language about UN support for education, because, he said, it might be read as endorsing "educa[tion] irrespective of race."

In the end, the U.S. delegation agreed to a UN Charter that called for "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." But the Americans also guaranteed that the United Nations had no authority to intervene in human-rights matters, which were "presumed," in the words the United States insisted be written into the charter, "to be solely within the domestic jurisdiction of each country." The U.S. delegation also successfully lobbied against establishing a powerful commission to consider these issues. The UN Commission on Human Rights, as ultimately created, was essentially toothless.

Back in Washington, southern Democrats, with their iron grip on the U.S. Senate, remained alarmed. President Harry Truman, abandoning his own progressive record on race relations, had assured the Senate that the UN Charter imposed no legal obligations on U.S. courts; it merely enumerated "moral principles." Yet as they watched the domestic civil-rights movement pick up steam, the southern senators became increasingly fearful that American litigants would someday be able to use the UN Charter to get segregation laws overturned at home. And those fears were only strengthened when the question of racism was among the first placed on the agenda of the new world organization.

In the autumn of 1946, India requested that the United Nations investigate the treatment of Indian nationals and their descendants in South Africa. Later that same year, the National Negro Congress of the United States filed a petition to the UN Economic and Social Council, calling on the United Nations to study the patterns of racial discrimination in

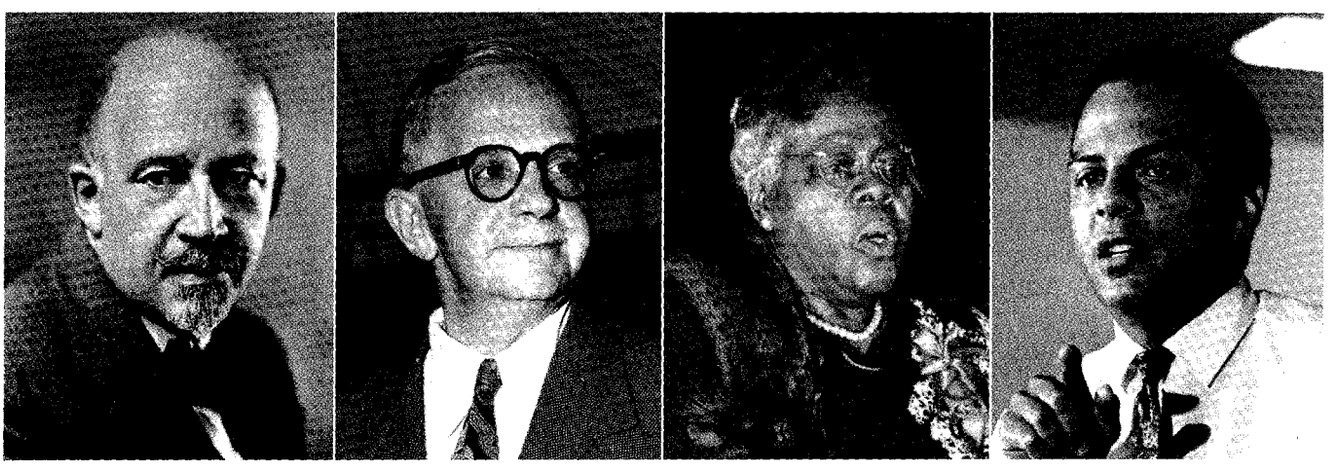
America and to take appropriate actions to ensure U.S. compliance with international human-rights standards. In 1947, a similar submission was drafted by DuBois for the NAACP and was reviewed by Thurgood Marshall and Robert Carter, who were at that time part of the NAACP's legal team and who later argued *Brown v. Board of Education* before the U.S. Supreme Court.

South Africa and the United States both tried to fend off international scrutiny by joining forces and citing the "domestic jurisdiction" language in the UN Charter. Even human-rights advocate Eleanor Roosevelt wanted to prevent any UN actions against apartheid in South Africa that could later become a precedent for international scrutiny of American race relations.

It was left to African American leaders to argue that the issue of racial discrimination in the United States was not a purely domestic matter. Their petitions were being filed at a significant number of Third World governments and future leaders in postcolonial countries.

It also received widespread U.S. and international press coverage and deeply embarrassed the Truman administration. Moreover, as Cold War hostilities flared—and the Soviet Union and the United States vied for the hearts and minds of emerging Third World states, including various postcolonial African ones—the Soviets made the most of these revelations of the ugliness of Jim Crow and the persistence of de facto racial discrimination throughout the United States.

Under the circumstances, the United States had only two choices: It could declare that the UN Charter prohibited racial discrimination and bring an end to segregation in America, or it could pull down the curtain on further international scrutiny of American practices. The Truman administration took the latter path. The cause of racial justice was sacrificed.



African-American Leaders at the United Nations: (*from left*) W.E.B. DuBois, Walter White, Mary McLeod Bethune, Andrew Young

a time when parts of the United States actively required segregation by law in educational systems, employment, and housing. Other areas of the country practiced de facto segregation. The federal government and judicial system were turning a blind eye to what was called "southern justice," while countless African Americans were denied voting rights and, instead of fair trials, faced beatings, torture, and lynchings. Particularly in the South, white resistance to even minor advances in the rights of African Americans often culminated in hostility and violence. Charles Houston, counsel for the NAACP, presented this evidence and made a straightforward case. "Where the national government either cannot or will not afford protection and redress for local aggression against colored peoples," he argued, the matter falls within the competence of the United Nations. "A national policy of the United States which permits disfranchisement in the South is just as much an international issue as elections in Poland or the denial of democratic rights in Franco Spain."

While the matter of South African apartheid remained on the United Nations' agenda for decades, the NAACP petition was soon buried. Still, it served the very important function of attracting highly visible, albeit informal, support from

The U.S. strategy was one of half-truths and evasions. For instance, while admitting that certain problems existed, American officials maintained that discrimination was already outlawed under the U.S. Constitution. But in 1947, this assertion was at odds with Supreme Court rulings, which upheld segregation laws until the *Brown* decision finally found them unconstitutional seven years later. Similarly, the U.S. government gave in to pressures to establish a subcommission on minorities within the UN Commission on Human Rights, but maneuvered to ensure that its primary focus would be on national minority populations, mostly in Europe, that were trying to preserve their languages and cultures. The definition of "minority" was so narrowly crafted that it was understood for the next several decades to exclude African Americans from the new subcommission's consideration.

As time went on, a series of international treaties were negotiated to protect human rights, and leading southern senators saw those, too, as threats to the U.S. racial system. They maintained that ratifying the international Convention for the Prevention and Punishment of the Crime of Genocide, for instance, would be a back-door

route to enacting federal anti-lynching legislation, something they had continuously opposed. And when the Civil Rights Congress, an American anti-racism organization, decided in 1951 to document the violence perpetrated against blacks and present it to the United Nations, charging the United States with genocide, the southern senators proclaimed their fears vindicated.

They were not alone. Senator John Bricker of Ohio went so far as to launch an all-out national campaign to convince Congress and the American people that human-rights treaties were designed to erode American liberties. He introduced a constitutional amendment to restrict the president's treaty-making powers.

President Dwight Eisenhower, who had come to the Oval Office in 1953, decided to sacrifice American leadership on human rights rather than risk defeat on the Bricker amendment in Congress. He completely abandoned the UN human-rights treaty system, pledging that his administration would not seek future ratifications of international human-rights treaties. And that policy was maintained for more than 25 years.

As a result, the United States failed to ratify the genocide convention until 1988. It was not able to participate fully in the early development of three of the most important UN human-rights treaties containing significant nondiscrimination clauses: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICCPR and the ICERD were not ratified until 1992 and 1994, respectively, and even then, the Senate attached a package of reservations to make sure that the treaties would have no significant impact on civil-rights litigation in U.S. courts. The ICESCR, meanwhile, has yet to be ratified by the United States.

It is not only America's role in the international movement for human rights that has suffered as a result. According to Carol Anderson, whose book, *Eyes Off the Prize*, documents these events, the loss of American involvement in the development of human-rights treaties and "the pervasive notion that there was something un-American and communistic about human rights converged to severely constrict the agenda for real black equality."

Until very recently, American judges resisted even references to international or foreign law in making their decisions. Meanwhile, civil-rights attorneys, finding human-rights treaties unhelpful in gaining specific remedies for their clients, came to be generally disinterested in the global rights movement.

The United States has been particularly hostile to the notion of economic, social, and cultural rights, which for a long time were viewed here as mere Soviet-inspired rhetoric. In the days when any leader who broached such matters was likely to be attacked as a communist, the American movement for racial equality chose to focus largely on the denial of civil and political rights, pursuing mainly voting-rights and nondiscrimination cases. We can now see the limitations of this strategy for lifting our whole community from historical disadvantage. The still-unmet goals of the civil-rights struggle today are primarily about economic and social needs—a living wage, decent shelter, adequate food, life-sustaining health care. Placing these issues within an international human-rights framework would allow them to be seen, as they are in most of the rest of the world, as falling squarely within the category of rights—a profound difference from the way they are widely perceived in America today.

The lack of connection between the civil-rights movement in America and the global human-rights movement is a tremendous loss. Even our understanding of what justice is about has been narrowed and clouded by it. It is thus good news that American civil-rights organizations have recently begun to examine the relevance and meaning of international human-rights norms to our struggle here at home.

Even the U.S. Supreme Court has begun to acknowledge international and foreign court decisions and treaty oversight bodies as legitimate sources of human-rights law.

The large participation of American groups at the UN World Conference Against Racism in Durban, South Africa, in 2001 was encouraging, as it set the stage for new alliances and perspectives. However, the U.S. government boycotted this conference, rekindling old feelings of betrayal among civil-rights groups. Once again the White House chose to relinquish its leadership rather than fight what were admittedly difficult battles on race issues.

Others, though, are awakening to the realization that there are important lessons to be learned from how other countries approach human rights. Even Supreme Court justices are acknowledging international and foreign court decisions and the jurisprudence of treaty-oversight bodies. An important ray of hope came with Supreme Court Justice Ruth Bader Ginsberg's reference to ICERD in her opinion concurring with the Court's 2003 decision upholding affirmative action in admissions at the University of Michigan. It would have been better if civil-rights litigators had been able to use ICERD directly in seeking that outcome, accepting the international treaty as binding U.S. law, but that is something for the future.

America helped create international procedures to protect and promote human rights, but American resistance to fully participating in them is only just beginning to subside. ■

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Economic Security: A Human Right

Reclaiming Franklin Delano Roosevelt's second bill of rights

BY CASS R. SUNSTEIN

ARE SOCIAL AND ECONOMIC RIGHTS FOREIGN TO AMERICAN TRADITIONS? Are they inconsistent with our laissez-faire freedom-loving culture? Consider a defining moment in our nation's history, when national security was also threatened and when an American president argued that freedom itself required social and economic rights. In our own day, we should be paying close attention to his arguments.

On January 11, 1944, the United States was involved in its longest conflict since the Civil War. The war effort was going well. At noon, America's optimistic, aging, wheelchair-bound president, Franklin Delano Roosevelt, sent the text of his State of the Union address to Congress. Ill with a cold, Roosevelt did not make the customary trip to Capitol Hill to appear in person. Instead, he spoke to the nation via radio—the first and only time a State of the Union address was also a "fireside chat."

Roosevelt began by emphasizing that "the one supreme objective for the future"—for all nations—was captured "in one word: security." He argued that the term "means not only physical security which provides safety from attacks by aggressors" but includes as well "economic security, social security, moral security." Roosevelt insisted that "essential to peace is a decent standard of living for all individual men and women and children in all nations. Freedom from fear is eternally linked with freedom from want."

Roosevelt said that the nation "cannot be content, no matter how high that general standard of living may be, if some fraction of our people—whether it be one-third or one-fifth or one-tenth—is ill-fed, ill-clothed, ill-housed, and insecure." Roosevelt looked back, and not entirely approvingly, to the framing of the Constitution. At its inception, the nation had grown "under the protection of certain inalienable political rights—among them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures."

But, he added, over time, "we have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence." As Roosevelt saw it, "necessitous men are not free men," not least because those who are hungry and jobless "are the stuff out of which dictatorships are made." He echoed the words of the Declaration of Independence, urging a kind of Declaration of Interdependence: "In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed."

Then he listed the relevant rights:

> "The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation;
> The right to earn enough to provide adequate food and clothing and recreation;
> The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;
> The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;
> The right of every family to a decent home;
> The right to adequate medical care and the opportunity to achieve and enjoy good health;
> The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;
> The right to a good education."

"After this war is won," Roosevelt said, "we must be prepared to move forward, in the implementation of these rights." And there was a close connection between this implementation and the coming international order. "America's own rightful place in the world," he said, "depends in large part upon how fully these and similar rights have been carried into practice for our citizens. For unless there is security here at home there cannot be lasting peace in the world."

Roosevelt did not argue that the Constitution should be amended to include the "Second Bill of Rights." But he did believe that social and economic rights ought to be seen as a defining part of our political culture, closely akin to the Declaration of Independence—a place to look for our deepest commitments. On this count, Roosevelt's plea can claim strong roots in American history. James Madison, the most influential member of the founding generation, explicitly supported "laws, which, without violating the rights of property, reduce extreme wealth to a state of mediocrity, and raise extreme indigence toward a state of comfort."

Thomas Jefferson spoke in similar terms, saying: "I am conscious that an equal division of property is impracticable. But the consequences of this enormous inequality producing so much misery to the bulk of mankind, legislatures cannot

invest too many devices for subdividing property, only taking care to let their subdivisions go hand in hand with the natural affections of the human mind. ... Another means of silently lessening the inequality of property is to exempt all from taxation below a certain point, and to tax the higher portions of property in geometrical progression as they rise."

Roosevelt's speech has had a large international influence; the Second Bill of Rights should be seen as a leading American export. The Universal Declaration of Human Rights, written in the shadow of FDR and accepted by the UN General Assembly in 1948, explicitly includes social and economic guarantees. The United States enthusiastically supported the declaration (but has been exceptionally unusual in refusing to ratify the International Covenant on Economic, Social, and Cultural Rights, which would help to enforce social and economic guarantees). Many constitutions include social and economic guarantees in a way that can be traced directly to Roosevelt's speech.

But put history and international practice to one side. Was Roosevelt right to suggest that America should accept a Second Bill of Rights as part of its defining aspirations? I believe that he was. The Second Bill is designed to protect two of the most fundamental of human interests: basic opportunity and minimal security.

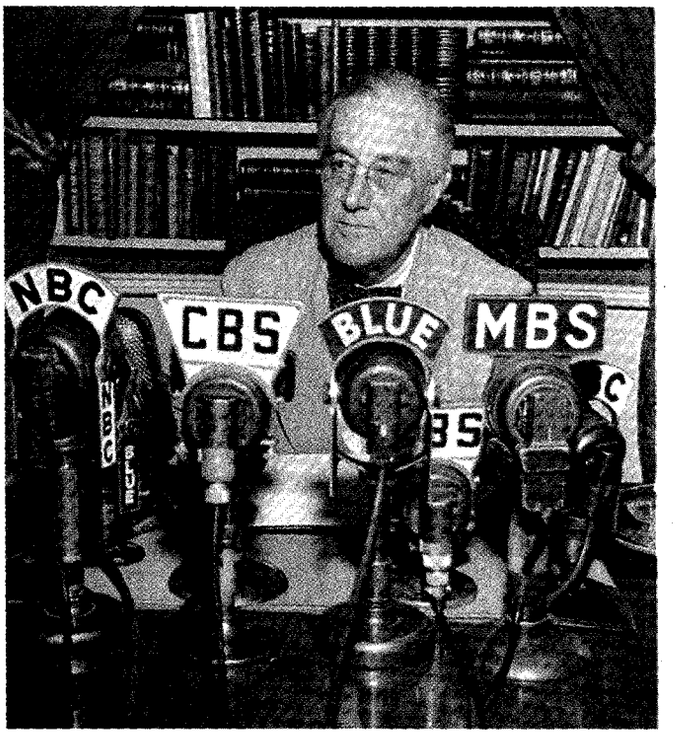
BASIC OPPORTUNITY

In principle, Americans on both left and right are committed to "equal opportunity." But a moment's reflection should be enough to show that in a free society, equal opportunity is elusive. Because some people have more wealth than others, some children will have more and better opportunities. Those who think they are committed to "equal opportunity" are thus actually in favor of "decent opportunity," a more modest and practical aspiration. Achieving decent opportunities for all was one of Roosevelt's central commitments.

The right to good education is the most obvious example. By elevating a good education to the status of a right, Roosevelt meant to emphasize several points: that in many domains, education is indispensable to decent prospects in life; that it is a basic safeguard of individual security; that those who are well-educated are less likely to fall, and, if they do, are more likely to be able to pick themselves up; and that education is necessary for citizenship itself. It is noteworthy that of all the rights listed in FDR's Second Bill, the right to education is by far the most frequently included in the constitutions of the states. Forty-nine of the 50 give it some constitutional recognition (Iowa is the only holdout).

Against the backdrop of the Great Depression, Roosevelt was also asserting the right to a "useful and remunerative job," not through government employment but through a flourishing economy that is constantly creating more positions. But he also believed that if the private sector failed to provide enough jobs, government should provide opportunities; and he saw those opportunities as rights, not privileges.

Other rights in the Second Bill that concern opportunity include "the right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad." Roosevelt was emphasizing that for real opportunity to exist, government must prevent monopolies; because they squelch competition, they deprive people of a fair chance to obtain employment and wealth.



MINIMAL SECURITY

Opportunity, if it bears fruit, produces security. But some aspects of the Second Bill aim at security directly, by creating a floor below which human lives are not permitted to fall. In Roosevelt's words, "Government has a final responsibility for the well-being of its citizenship. If private co-operative endeavor fails to provide work for willing hands and relief for the unfortunate, those suffering hardship from no fault of their own have a right to call upon the Government for aid; and a government worthy of its name must make fitting response." Thus, certain aspects of the Second Bill protect freedom from desperate conditions—a form of liberty, not equality.

Roosevelt sought a kind of national insurance program that would help people suffering from the inevitable accidents and catastrophes of life. Roosevelt, himself a victim of polio, believed that each of us is vulnerable to dangers that cannot be wholly prevented. Insofar as the Second Bill would ensure food, clothing, shelter, and health care for all, it would insure against the worst of those dangers.

Evidently Roosevelt came to believe that rights are instruments, or tools, designed to protect human interests. The more fundamental the interests, the more important the instruments. Nor is it unfamiliar or odd to think of rights in this way. Freedom of speech should be understood in these terms, as an effort to protect a wide range of human values. The Second Bill can be analyzed similarly. It identifies a range of fundamental human interests and promises to protect them.

OBJECTIONS

Of course, social and economic guarantees are controversial. Consider the widespread view that democracies should respect "negative rights," or rights against government interference, but should not acknowledge "positive rights," or rights to government help. This view is tangled in a massive confusion, and for one simple reason: The so-called negative rights are rights to government help, too.

To see the problem, begin with the two foundations of a market economy: private property and freedom of contract. Neither of these can be guaranteed by laissez-faire, because both require government assistance. Private property depends on property rights, which do not exist without government and law. Roosevelt himself made the point as early as 1932, asserting "that the exercise of ... property rights might so interfere with the rights of the individual that the government, *without whose assistance the property rights could not exist*, must intervene, not to destroy individualism but to protect it" (emphasis added).

In fact, the government is "implicated" in everything people own. If rich people have a great deal of wealth, it is because the government furnishes a system in which they are entitled to have and to keep that wealth. When a company owns a broadcasting station or a series of broadcasting stations, this is possible only because the government creates a right of ownership and is prepared to back up that right with the law. People work very hard for what they earn. But without government, people would face a free-for-all, a kind of test of strength. Who knows what would emerge from that test? The people who most loudly object to "government intervention" depend on it every day of every year; they have the most to lose if government really got "off their backs." Once these points are understood, it becomes impossible to oppose the Second Bill on the ground that rights are properly limited to protection "against" government. Even for those who reject the Second Bill, freedom requires government's presence, not absence.

Many people might acknowledge this point but object to social and economic rights on pragmatic grounds. They might fear that the Second Bill would destroy people's incentives and reward sloth. Perhaps the Second Bill would give citizens an unhealthy and even destructive sense of entitlement—a belief that whatever they do, the state owes them the material preconditions for a decent life. But this was not Roosevelt's goal. He did not say that people should be given resources if they were able-bodied but refused to work. It was only when opportunity was not enough that Roosevelt argued for minimal guarantees as a matter of basic justice.

PROSPECTS

The Second Bill of Rights was aimed at providing security in the face of a wide range of social risks—and to see that security as a fundamental right, a condition of freedom. Can it be reclaimed today? I think so. American self-understandings are constantly being revised, with fresh attention to central aspects of our history. Consider the current effort to recover the legacy of Ronald Reagan. The celebration of Reagan, and the effort to place him in the pantheon of the greatest presidents, is much less about his smile than about his substance. Reagan's opposition to federal regulation, asserted in an idiom of self-help, reflect simple principles that resonate with one strain of the American experience.

Roosevelt's Second Bill of Rights should be able to do much better. In fact Roosevelt was Reagan's stylistic model; FDR had all of Reagan's humor and grace, without the Hollywood veneer. (The wheelchair-bound president liked to end meetings by saying, "I'm sorry, I have to run.") Better than any other speech or document, the Second Bill captures the extraordinary shift in the nature of government in the 20th century—a shift that most of the country continues to support. Most Americans favor a right to education, a right to be free from monopoly, a right to social security; and in many polls, most Americans favor a right to a job and a right to health care. Equally important, the national government is committed, if only in principle, to most of the rights that Roosevelt cataloged.

Many constitutions include economic and social rights that can be traced to Franklin Roosevelt's speech.

Of course, the commitment is ambivalent, in part because of the pervasiveness of misleading conservative homilies about the evils of government intervention. There is no Depression to activate rethinking of the Rooseveltian sort, and, thus far, the war on terrorism has failed to produce a new focus on human vulnerability in all its forms. But the general public is increasingly distressed by social insecurity, perhaps above all that of health care under laissez-faire auspices. John Kerry has often said that health care is "a right, not a privilege," a phrase that borrows directly from Roosevelt's Second Bill of Rights. A generalized right to decent health care can attract, and is attracting, widespread support. There is a growing concern that tens of millions of working people do not earn enough money to support their families. The Earned Income Tax credit, an innovation since Roosevelt's time, can be understood as protecting a basic right: decent earnings for honest work. Leaders who want to pursue this path lack the strong tailwind that Roosevelt enjoyed. But they do have economic and social circumstances that are making millions of ordinary Americans increasingly uneasy about laissez-faire.

In any case, America's principles and self-understandings help to determine our practices. For much too long, the far right has succeeded in defining the nation's principles, leading Americans and the world to see the United States through a distorted mirror—one that disserves our own history. The sooner we eliminate the distortion, the better. ■

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International Holdout

Around the world, empowering women is considered essential. So why isn't America on board?

BY ELLEN CHESLER

TWENTY-FIVE YEARS AGO this December, the General Assembly of the United Nations adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), a global "bill of rights" that is both visionary and comprehensive. In the waning days of his presidency, Jimmy Carter hurriedly signed the convention and sent it to the U.S. Senate for ratification. But it has languished there ever since, held up by intransigent conservatives opposing both international obligations and women's rights. One hundred seventy-seven countries around the world have signed the treaty, leaving the United States among a handful of so-called rogue states—including Iran, Somalia, and Sudan—that have failed to do so.

For years the famously cantankerous Jesse Helms led the attack against CEDAW, calling it the work of "radical feminists" with an "anti-family agenda." "I do not intend to be pushed around by discourteous, demanding women," he said provocatively on the Senate floor in 1999. Helms, of course, is no longer around to exercise his veto, but George W. Bush is now standing in the way, even as he justifies two wars against fundamentalism, at least partly in the name of advancing the status of women abroad.

Around the world, empowering women is now widely considered essential to expanding economic growth, reducing poverty, improving public health, sustaining the environment, and consolidating transitions from tyranny to democracy. A near-universal consensus is calling for fundamental changes in practices that have denied rights to women for centuries. If the Democrats retake the White House and/or the Senate, it will be time to insist that the United States finally become an official party to the agreement.

CEDAW's passage in 1979 marked the beginning of formal UN commitment to advancing the status of women. It was meant to realize the original promise of the landmark 1948 Universal Declaration on Human Rights, which entitles every individual to the exercise of the rights and freedoms it sets forth—without distinction of any kind, including race, religion, ethnicity, class, or sex. In this sense, CEDAW serves as a recognition of the transformative potential of human-rights doctrine on personal relationships, not just political ones.

By failing to ratify a landmark convention on women's rights, America places itself in the company of rogue nations.

With the advent of the Cold War and the postcolonial rise of so many totalitarian regimes, human-rights discourse principally focused on the public realm, on protecting individuals from arbitrary state authority and brutality. CEDAW marked the beginning of a new era in using the language of human rights to challenge long-established social and cultural traditions, along with civic and political ones, that diminish women.

CEDAW acknowledges the importance of women's traditional obligations within the family, but it also establishes new norms for women's participation in all dimensions of life. It catalogs a broad range of rights in marriage and family relations, including property, inheritance, and access to health care, with an explicit mention of family planning (though not of abortion). It demands equality for women as citizens with full access to suffrage, political representation, and other legal benefits; it also declares their right to education, including professional and vocational training and the elimination of gender stereotypes and segregation. Lastly, it establishes their rights as workers deserving equal remuneration, Social Security benefits, and protection from sexual harassment and workplace discrimination on the grounds of marriage or maternity.

In a number of countries—including South Africa, Brazil, Australia, Zambia, Sri Lanka, Uganda, and, most recently (if ironically), Afghanistan and Iraq—treaty provisions have been incorporated into constitutions or bills of rights for women. Elsewhere, the treaty has been used to pass specific laws governing workplace practices and property rights, improving access to girls' education, extending maternity leave and child care, requiring legal protection for victims of domestic violence, outlawing female genital cutting, expanding family-planning access, and curbing sexual trafficking.

Like all international covenants, the treaty respects national sovereignty and does not impose absolute legal obligations. CEDAW is not "self-executing"; it requires that domestic laws be passed to implement its provisions. It also provides for the granting of "reservations, understandings and declarations," if necessary, to accommodate local variations from its standards. Indeed, many signatories do not live up to its obligations, an admitted weakness of many human-rights statutes. Still, ratifying countries are obliged to submit regular reports to the United Nations, where a CEDAW committee semi-annually reviews each country's progress toward implementation and reports to the General Assembly with recommendations for improvement.

Conservative opponents of the treaty in the United States regularly misrepresent and ridicule the work of this committee. Their most common canards repeat the same specious claims that earlier defeated the Equal Rights Amendment to the U.S. Constitution: that CEDAW abridges parental rights, threatens single-sex education, mandates combat military service for women, demands legal abortion, sanctions homosexuality and same-sex marriage, prohibits the celebration of Mother's Day, and the like—all not true, of course.

Another reason it has been hard to generate energy in support of America's signing of the convention is a widespread but false assumption that American women don't really need it, protected as they are by a substantial body of U.S. case law. U.S. Supreme Court Justices Stephen Breyer and Ruth Bader Ginsburg counter this claim. Both have spoken widely of the positive benefits of applying international standards in pursuing equality under U.S. law. Their concurring opinion in *Grutter v. Bollinger*, the recent case upholding the use of affirmative action by the University of Michigan, cited the International Convention on the Elimination of all Forms of Racial Discrimination, which the United States has ratified and which obliges governments to look not only at intent but also at outcome in judging racist practices. Ginsburg, in a recent article defending workplace affirmative-action policies for women and promoting paid family leave and child care (benefits this country still does not provide), encouraged the use of CEDAW as a justification for change.

Some, like Leila Milani of the Working Group on Ratification of CEDAW, argue that the convention might also be used to encourage equal representation in Washington, where the U.S. Congress and all executive agencies are exempt from affirmative-action laws. This is particularly important because, despite substantial gains, women hold only 14 of 100 seats in the U.S. Senate, 59 of 435 in the House of Representatives, and, elsewhere around the country, approximately 20 percent of state legislative positions.

This, of course, is nowhere near the minimum goals for legislative participation by women that Afghanistan and Iraq both included in their constitutions (with U.S. encouragement). Support for CEDAW is growing nationally, though. A September 2003 Zogby poll for the Foreign Policy Association shows that when the treaty is explained, seven in 10 Americans assign high importance to it, ranking it above the Kyoto Protocol on the environment and on par with agreements on nuclear weapons. Several states have already passed resolutions urging Senate action. And in San Francisco, a young women's group called Women's Institute for Leadership Development for Human Rights (WILD) successfully pushed for the passage of a local ordinance applying CEDAW's principles to municipal laws and demanding a gender audit of city hiring and contracting. Similar efforts are under way in New York and Iowa.

For social activists looking to educate the public on women's issues, a campaign to ratify CEDAW could be an effective tool, especially in light of Bush administration backsliding on women's issues such as workplace discrimination and reproductive health. A grass-roots campaign for CEDAW has extended its reach considerably in recent years. There is a sizable organizational infrastructure already in place. Media strategies have been developed through an initiative of the Communications Consortium Media Center in Washington. Lobbying strategies are also being developed through the CEDAW Working Group and the Women's Edge Coalition, both of which report growing interest from Democrats and Republican moderates in the Senate, including Richard Lugar, the highly considered Foreign Relations Committee chairman, who replaced Helms when the North Carolina senator retired.

A logjam remains in the Bush administration, to be sure, but a resolute electorate, pushed by a public education and mobilization effort with real muscle behind it, may be able to change that. ■

ELLEN CHESLER *is a senior fellow at the Open Society Institute in New York. She contributed an agenda for women's rights, from which this article is drawn, to* What We Stand For: A Program for Progressive Patriotism.

Domestic Abuse

How the U.S. government is violating Native Americans' human rights

BY TARA McKELVEY

PICKSTOWN, S.D.—

SANDY WADE WAS 6 WHEN SHE was sent away to St. Paul's Indian Mission, a boarding school overseen by the Bureau of Indian Affairs (BIA) on the Yankton Sioux reservation. At first, things weren't so bad. She got three meals a day—a welcome change from home, where she and her nine brothers and sisters often went hungry. But, as she discovered, not everybody fared so well, especially younger boys like her brother Frank "Butch" Wright, who lived across campus in St. Katharine's dormitory, a red-brick building with bars on the windows and double-padlocked doors.

"When I saw him, he was always hungry and dirty and crying," says Wade, 58, who works as a computer technician and has a long, black braid that falls over her shoulder. "Stuff happened to him that he never really got over."

At age 14, Wright told her he'd been sexually abused at school. Four years later, he died of a drug-induced coma. Another former student, Sherwyn Zephier, a 47-year-old art teacher who carved a tattoo—"PEACE"—in his leg while living in St. Katharine's, recalls how he and other children were whipped and beaten on a regular basis.

"Human rights?" says Zephier, standing in front of St. Katharine's on an August evening. "I never knew we had such a thing."

On July 13, Zephier, Wade, and other former students filed a lawsuit against the Catholic Diocese of Sioux Falls, South Dakota, and several religious organizations, according to Gary Frischer, a Los Angeles–based legal consultant. (Jerry Klein, chancellor of the Sioux Falls diocese, said he preferred not to discuss the lawsuit, adding that the diocese "never ran or controlled the school.") Last year, on April 9, Zephier and others filed a class-action lawsuit against the U.S. government. David W.

Anderson, the U.S. Department of the Interior's assistant secretary of Indian affairs, didn't responded to numerous requests for an interview.

Approximately 100,000 Native American children were placed in BIA–managed boarding schools over the past century, according to Andrea Smith, interim coordinator of the Boarding School Healing Project, a coalition of Native American organizations. In this little-known chapter of American history, many of these children were not only physically abused; they were also stripped of their cultural identity. As Zephier explains, children were forced to give up Indian names, stop speaking their own language, and cut off their long braids. The philosophy was simple: "Kill the Indian. Save the Man," according to Captain Richard C. Pratt, who opened the first BIA–run school in Carlisle Barracks, Pennsylvania, in 1879.

Trail of Tears: St. Mary's Mission School, Omak, Washington

SADLY, THE ABUSE OF INdian children is the tip of the iceberg. The U.S. government has violated human rights in its treatment of Native Americans over many generations and in a multitude of ways, say human-rights experts. Besides the right to religious freedom and physical safety, both of which were violated at the BIA–run schools, land rights, the right to self-determination, and many other rights have been systematically jeopardized—mainly because a separate legal regime has been set up for Native Americans, which legal scholars say often denies them due process and little or no recourse when laws are violated.

The separate legal system dates back to 1775, when the United States signed its first treaty with a tribal government. According to that treaty (and many of the ones that followed), the United States recognizes tribal governments as autonomous and agrees to protect their land, resources, and treaty rights. But there's a catch: An 1886 Supreme Court case (*United States v. Kagama*) allowed Congress to limit tribal sovereignty. And over the years, say experts, Congress has ignored many of the treaties, violated Native American rights, and taken land at will.

"We need to look carefully at the domestic implementation of international standards that we've worked hard to develop around the world," says Hadar Harris, executive director of the American University's Center for Human Rights and Humanitarian Law. "A perfect example of the disconnect is the ways in which fundamental human rights of Native Americans have been affected."

The "disconnect" is rooted in official schizophrenia—at least when it comes to federal policy toward Native Americans. "American policy has been on a pendulum for 200 years," says Keith Allred, an associate professor at Harvard's Kennedy School of Government who has mediated disputes between tribal and local governments. For years, he explains, the federal government has swung between granting and denying self-government to tribes. "We've left vestiges of old policies in place and moved to new ones and created a confusing and difficult patchwork of policies and institutions," he says.

But Paul DeMain, editor of the twice-monthly *News From Indian Country*, says the pendulum has mostly swung in one direction: toward the undermining of tribal governments, despite official claims of their sovereignty. "Congress can enact any law and make it impact Indian country," he says. "How can that be sovereignty? It's as sovereign as Iraq is. Which means the new Iraqi government will be as sovereign as the U.S. government allows them to be."

Native Americans are often frustrated by the restrictions on tribal self-government. But that's not all. They're also faced with a Congress that claims the right to wield "plenary," or absolute, power over them.

THE WESTERN SHOSHONE LAND dispute, which began in 1974 when the U.S. government claimed Native American ancestral lands in Nevada, is a glaring example of how the United States can overstep its bounds. That year, U.S. officials said a Western Shoshone title on the land had expired and, as a result, it belonged to the public. Two sisters, Carrie and Mary Dann, who were letting their cattle graze the land, were accused of trespassing.

"You've got a Congress that's perfectly willing to go on using discriminatory doctrines against tribes," says Robert "Tim" Coulter, executive director of the Indian Law Resource Center in Helena, Montana. "And so, in desperation, Indian leaders are working at the international level to create an awareness of what the law ought to be."

The Dann sisters fought for their land, going beyond U.S. domestic courts to the Organization of American States (OAS). On December 27, 2002, they were handed a victory, of sorts: The organization's Inter-American Commission on Human Rights found the United States in violation of international laws in its handling of their complaint.

The Danns aren't the only ones who've sought justice at an international level. Increasingly, indigenous people in other parts of the world who've seen land, property, and cultural artifacts taken away are turning to organizations like the OAS and the United Nations, which has created a Permanent Forum on Indigenous Peoples to address their concerns. Under the auspices of the UN, indigenous people from around the world meet to discuss land rights and

other issues. In addition, members of the Indian Law Resource Center have helped World Bank officials revise their policies, providing more protection for indigenous peoples. Yet international assistance only goes so far. The Bush administration, for example, didn't exactly snap to attention after hearing the Inter-American Commission on Human Rights' findings.

"They've basically ignored it," says Harris.

For the Danns, the outcome has been catastrophic.

"Our livelihood is gone," Carrie Dann said at a June 21 Ford Foundation meeting in New York. "They never did like us, but the attack now, under the current administration, is like nothing I've ever seen."

Four days later, on June 25, Congress passed a bill that allows Western Shoshone tribal members to receive $15,000 to $30,000 apiece for the land. Its value was based on an 1872 price, roughly 15 cents an acre. On July 7, President Bush signed the Western Shoshone Distribution Act.

LAND GRABS ARE ONLY THE MOST extreme and visible way that the denial of human rights affects Native Americans. Tribal governments have official legal systems—some with their own police and courts, Allred notes, yet no jurisdiction over non-tribal members in ordinary legal disputes. So, for example, when tribal police get a call from an Indian woman who's been assaulted by her white husband, they're not allowed to arrest him.

"If it's a heinous crime, the FBI steps in," explains Charon Asetoyer, executive director of the Native American Women's Health Education Resource Center, a nonprofit organization based in Lake Andes, South Dakota. "But how many times does a woman have to have a broken arm before they step in?"

It's another way that an unjust legal system produces suffering. Says Allred, "Domestic abuse just goes rampant and unchecked in Indian country."

This fall, activists working with the Boarding School Healing Project are fighting back. They're documenting abuses at past and current BIA–run schools (a recent report issued by the Interior Department's inspector general says the federal agency recently hired individuals convicted of battery and child endangerment to work at the boarding schools) and are calling for a congressional hearing.

On a Saturday evening in August, Zephier sits at his computer in a home office as he clicks through photos of St. Paul's. He recalls how hard it was to bring up the subject of abuse with his 83-year-old father. But a couple of months before his father's death in January 2002, Zephier spoke told him what had happened. "I said, 'Dad, I'm going to sue the U.S government for what they did to us.'"

His father, Chief Black Spotted Horse, was silent. Finally, he spoke.

"He said, 'Good. I hope you win,'" says Zephier. "That was his blessing to me." ■

From the Front Lines

A review of recent reports on human rights

BY GARA LAMARCHE

EARLY IN THE CLINTON ADMINistration, the United Nations Human Rights Commission was holding hearings in New York on the compliance of various member states—including, for the first time, the United States—with the International Covenant on Civil and Political Rights. I was there because I was working at Human Rights Watch, but in the gallery observing the proceedings were a number of more surprising visitors—not just the professional UN watchers but a wide variety of advocates for civil rights and social justice, some of them quite poor themselves.

They came, I realized, because they saw in the body of international human-rights standards a tool for advancing their own work on behalf of the most marginalized of Americans: prisoners, poor people, and immigrants. Despite their disparate concerns, they were drawn by the same global vision, one more supportive of their goals, in many cases, than the U.S. Constitution.

The U.S. human-rights movement has grown in scope and strategic and intellectual sophistication since then, though it is still without a manifesto or a dominant organization. The best way to take its measure today is through a series of recent short reports, all of which are available on the Web.

■ **"Close to Home: Case Studies of Human Rights Work in the United States." The Ford Foundation, 2004, 108 pages.** www.fordfound.org/publications/recent_articles/close_to_home.cfm

■ **"Something Inside So Strong: A Resource Guide on Human Rights in the United States." U.S. Human Rights Network, 2003, 80 pages.** www.ushrnetwork.org/page2.cfm

These two reports—the first by the Ford Foundation, which has done more than any other organization to nurture and build the U.S. human-rights movement, and the second by a recently established network of advocacy groups— provide a good overview. The Ford report's introduction, written by program officer Larry Cox and consultant Dorothy Q. Thomas, describes the "revolution of values" represented by the new human-rights movement, which "counters unilateral tendencies with multilateral commitments, shared with other countries, to promote social and economic justice on a global scale." "Something Inside" catalogs the unexpectedly wide range of resources available to those who would hold America to international human-rights standards.

Neither report tries to hide the movement's frustrations. A number of the Ford report's case studies underscore how long such efforts take and how uncertain the results are. The Indian Law Resource Center, for instance, filed complaints with the Inter-American Commission on Human

Rights—along with the UN committee that monitors the international race convention—about the U.S. government's handling of a Western Shoshone land dispute. It took more than a decade to win reports in the Native Americans' favor from the two international agencies, and the U.S. government rejected both reports "in [their] entirety."

"Something Inside" reminds us that this route has distinguished antecedents: Marcus Garvey, for example, submitted complaints about U.S. abuses against people of color to the League of Nations in 1920, Cayuga Nation Chief Deskaheh did the same for indigenous people three years later; and W.E.B. DuBois petitioned the United Nations in 1951 to protest Jim Crow practices.

Nonetheless, today's efforts seem to hold a promise based on the growing range of organizations pursuing an international approach to American issues.

■ **"Making the Connection: Human Rights in the United States." WILD, 2000, 44 pages.** www.wildforhumanrights.org/pub_list.html

■ **"CEDAW: Rights that Benefit the Entire Community." Compiled and edited by Leila Rassekh Milani, Sarah C. Albert, and Karina Purushotma. The Working Group on Ratification of the UN Convention on the Elimination of All Forms of Discrimination Against Women, 2004, 122 pages.** www.womenstreaty.org/CEDAW_Book.htm

Until the formation of the U.S. Human Rights Network, the leading organization devoted to advancing human rights in the United States through appeal to international standards was probably the Women's Institute for Leadership Development for Human Rights (WILD), which has mobilized tremendous grassroots energy for its campaign to move the United States toward ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Though it has been a long time since mainstream rights groups such as the American Civil Liberties Union and the NAACP Legal Defense Fund were dominated by lawyers and lawsuits, many people still think of them as organizations for lawyers only and have hungered for a chance to play a direct role in rights campaigns. WILD has provided this opportunity in a campaign that led the San Francisco City Council to adopt CEDAW as city law, and in a subsequent "gender audit" of discriminatory practices by city agencies.

WILD was a convener, in 1999, of the first known meeting of U.S. human-rights advocates—all of them women—from a variety of organizations. "Making the Connection" reports the conclusions reached there about the direction of the emerging human-rights movement. The CEDAW report compiled by Milani, et al. lucidly debunks the claims made by CEDAW's opponents about the impact of this international treaty on U.S. law and practice.

■ **"Hunger Is No Accident: New York and Federal Welfare Policies Violate the Human Right to Food." New York City Welfare Reform and Human Rights Documentation Project, 2000, 58 pages.** www.internationalbudget.org/themes/ESC/hunger.pdf

■ **"Poor People's Human Rights Report on the United States." Kensington Welfare Rights Union, 1999, 48 pages.** www.kwru.org/index.html

As the KWRU report describes one person's job, "He removes graffiti from at least six buses a day using a caustic solution that burns his skin on contact."

The most exciting of the early documents in the U.S. human-rights movements not only apply international standards to U.S. behavior but do so in a realm that has been largely ignored by traditional U.S. rights organizations: economic and social rights. Indeed, the United States, joined for much of the postwar period by the leading U.S. rights organizations, has been grudging at best and hostile at worst to the very notion of economic and social rights. More than in any other area, this is where U.S. law and political culture are out of step with the rest of the world.

As Cass R. Sunstein describes elsewhere in this issue, there have been opportunities to establish economic and social protections—the guarantee of a job, food, a decent home, and medical care—as rights in America. Franklin Delano Roosevelt called for that in 1944, and Lyndon Johnson saw his Great Society as an expansion of the Bill of Rights. But today it falls to feisty grassroots advocates to advance this vision.

"Hunger Is No Accident" opens with a succinct statement of the value of a human-rights approach to hunger and poverty, converting "needs into rights." As former Attorney General Ramsey Clark famously said, "A right is not what someone gives you; it is what no one can take away from you." The human-rights approach also "internationalizes" the struggle for economic and social justice. As Amnesty International and Human Rights Watch publications have done for two decades, the "Hunger" report details example after example of onerous requirements and restrictions that government agencies place on poor people seeking food or job assistance and concludes with specific recommendations for action.

The Kensington Welfare Rights Union (KWRU) is widely acknowledged as a leader in marrying human-rights standards—the right, for instance, to workplace safety—with grass-roots activism for economic justice. Its 1999 report grew out of a nationwide bus tour that featured marches and hearings in 35 communities around the United States. Whereas "Hunger is No Accident" features many compelling statistics, the KWRU report is striking for its human testimony, such as that of a man whose name is given only as Esteban and whose "workfare" assignment is cleaning buses for the city of San Francisco. As the KWRU report describes it: "He removes graffiti from at least six buses a day using a caustic solution that burns his skin on contact. The cheap latex gloves he is issued are not strong enough to prevent him and his co-workers from developing chemical lesions, sores and infections on their hands. The only time that Esteban receives additional protective equipment ... is when Municipal workplace inspectors arrive to conduct their 5-month yard check-

ups. The next day, it's back to the rubber gloves and paper jumpsuit."

■ **"Civil Society and School Accountability: A Human Rights Approach to Parent and Community Participation in New York City Schools." Center for Economic and Social Rights and New York University Institute for Education and Social Policy, 2003, 34 pages.** cesr.org/education/CESR/schoolaccountabilityhtml
This report, introduced by Katarina Tomasevski, the UN special rapporteur on the right to education, draws on lessons and experiences from Bangladesh to Burkina Faso to suggest a small but significant step that would advance accountability in New York City's education system: the establishment of an ombudsman empowered with the independence and resources to make the voices of parents and communities heard.

THE HUMAN-RIGHTS UMBRELLA offers Americans new tools, new perspectives, and new allies for fighting longstanding battles. These reports suggest how much might be accomplished with them. ■

GARA LAMARCHE, *the vice president and director of U.S. programs for the Open Society Institute, writes frequently on human-rights and social-justice issues.*

What We Expect From America

BY MARY ROBINSON

U.S. LEADERSHIP WAS CRITical in building the global human-rights agenda from the ground up, beginning with the 1948 Universal Declaration of Human Rights. More than half a century later, that agenda and the movement it inspired are in need of renewed U.S. leadership at every level, from grass-roots activism to government policy and actions, nationally and globally.

The reluctance of the United States to fully embrace the international human-rights system it did so much to establish has weakened efforts to use these tools to promote democracy and social justice in the United States and abroad. This has become an acute concern following the terrorist attacks of September 11 and decisions made by the U.S. government since, such as to hold detainees at Guantanamo Bay, Cuba, without Geneva Convention hearings; to monitor, detain, and deport immigrants against whom no charges have been made; and to restrict visitors and immigrants alike from many parts of the world.

In lowering its own standards, the United States has, often inadvertently, given other governments an opening to take measures that run against international rights commitments. I saw this firsthand as the United Nations high commissioner for human rights. Repressive new laws and detention practices were introduced in a number of countries, all broadly justified by U.S. actions and the international war on terrorism. I will never forget how one ambassador put it to me bluntly: "Don't you see, High Commissioner? The standards have changed."

We must challenge this view and do everything possible to maintain the integrity of international human-rights and humanitarian-law norms in light of heightened security tensions. Yet we must do more. We must also win the war of ideas and make the case that a world of true human security is only possible when the full range of human rights—civil and political, as well as economic, social, and cultural—are guaranteed for all people.

This thinking isn't new. In fact, it draws on the best traditions of U.S. leadership, evidenced in President Franklin Delano Roosevelt's celebrated 1944 State of the Union address. Those freedoms are spelled out clearly in international human-rights treaties. But succeeding U.S. administrations have rejected the idea that education, health, adequate housing, and food are *rights* to which citizens are entitled. Some critics contend that these are aspirations, not justiciable rights. Others point to fears that U.S. sovereignty and states' rights would be put at risk by ratifying such agreements. These philosophical and legal issues have long been debated. But far less consideration has been given to how U.S. positions may have weakened efforts to push for greater rights protections abroad, or to how the human-rights vision, legal framework, methods, and strategies could support and strengthen U.S. efforts to promote democracy and social justice today.

I am encouraged by the emergence of a U.S. human-rights movement that seeks to reclaim the full legacy and meaning of international human rights. For example, a growing number of academics at U.S. medical schools and groups such as Physicians for Human Rights are pushing for greater recognition of the right to the highest attainable standard of health for all—and demonstrating the impact this shift would have on the way decisions are made about health spending and access to health services, especially for the most vulnerable. U.S. development and humanitarian nongovernmental organizations increasingly use human-rights conventions as a means of empowering grass-roots civil-society groups to press their governments to take appropriate actions. The U.S. labor movement (through new initiatives such as American Rights at Work) and networks of women- and child-advocacy organizations are recognizing the potential power of the international human-rights agenda and mechanisms.

Reclaiming American traditions that contributed so much to the creation of the international human-rights movement will be an uphill journey. We must begin close to home, while being mindful that each step will have a profound impact on the realization of human rights around the world. ■

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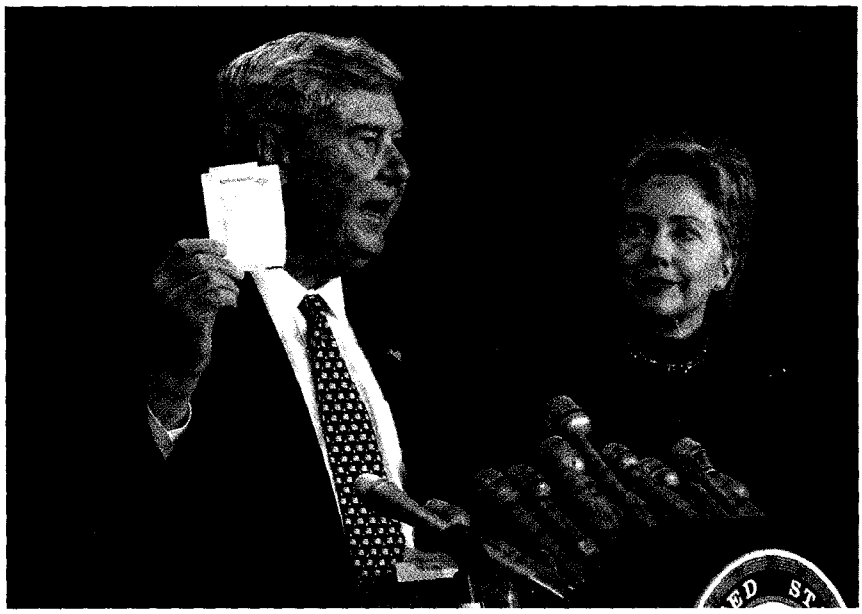
likely to be used in poor, minority areas and there will be no paper trail to look at in the case of a recall. In fact, in Florida, the 15 counties where touchscreen voting will take place in November contain 54 percent of the state's registered black voters. Election experts agree that the most reliable solution would be for as many states as possible to use optical-scan machines. But the EAC doesn't have the resources to help implement these, so most jurisdictions not using touchscreens will be going back to old punch cards and levers, especially in poor minority areas with less money to purchase optical scans. Like touchscreen voting machines, these don't leave a paper trail and they break down far more often than other machines.



Card Carrier: Senators Bob Graham and Hillary Clinton have made efforts to improve HAVA.

Defenders of HAVA claim that if voters are worried about the safety of machines, or are turned away from the polling station, they can cast what's known as a "provisional vote." A provisional vote is a basic paper ballot filled out at the polling station. Yet HAVA offers no national guidelines for counting these provisional votes, and each state counts them differently. Shockingly, the *Prospect* has learned, some states simply don't count provisional ballots at all.

Purges also may be more common than in the 2002, 2003, and 2004 state races. Forty-one states have had to put off their 2004 deadline for creating centralized, computerized voter databases until 2006. "This raises the possibility that many voters will encounter the same obstacles as in 2000, such as being erroneously purged from registration lists," the U.S. Commission on Civil Rights recently reported. In fact, a recent study by Scripps Howard News Service found that many of the states with the worst-maintained voter lists are also the key 2004 battleground states: Pennsylvania, Missouri, and Wisconsin, among others.

THE KERRY-EDWARDS CAMPAIGN, THE DEMOCRATIC National Committee (DNC), and a host of nonpartisan advocacy groups are desperately trying to prevent disaster. John Kerry's campaign has formed what the candidate calls a large "SWAT team" of lawyers designed to anticipate disenfranchisement before November. In Florida, the effort, headed by Miami attorney Steve Zack, will include at least 75 lawyers donating their time. In contrast to 2000, the Kerry legal team will be directly linked to the campaign, rather than filtered through state Democratic parties and the DNC. Backing the lawyers will be poll monitors and other aides, a team that will number in the thousands. "[T]here's a much more organized team on the ground for election day," says Mitch Cesar, chairman of the Broward County branch of the Florida Democratic Party. (The Bush-Cheney campaign reportedly will deploy a similarly large team of lawyers in key states.) Most important, says one source involved in the Kerry legal effort, the 2004 team will be organized to contest problems on election day rather than waiting until after the vote and then being lost in the post-election period.

Nonpartisan civil-rights and voting groups have launched similar efforts. Eliot Mincberg, legal director of People for the American Way, says the organization will have people on the ground on election day in nine battleground states with large minority populations, including Florida, Pennsylvania, and Missouri. They will open field offices staffed with attorneys ready to contact local election officials with challenges, and the organization will also be operating an "Election Protection" hotline for people to call with reports of potential disenfranchisement. The group will have smaller presences—distributing voting-rights information and hotline numbers—in 21 other states. Leach says the NAACP and similar groups are also using massive networks of volunteers to inform people about the new voting provisions before November and to staff hotlines for voters to call on election day.

Still, these are stopgap measures. Even sources within the Kerry campaign concede that more could be done. "We are doing a fairly good job of anticipating 2004 election day, but the task is so large that we will be challenged to do well all that we need," says one source within the campaign's legal effort.

Unfortunately, all the efforts they can cook up may not be enough to fight a system that's stacked against the Democrats in Florida and other states where Republicans control the legislatures, and election administrators say that their own power remains limited. Before 2000, for instance, the Florida secretary of state and top members of the Division of Elections were elected; after *Bush v. Gore*, a bipartisan Florida task force recommended that the governor make state and county election supervisors nonpartisan. Jeb Bush rejected the recommendation, and shortly afterward the Republican-controlled Florida Legislature made all top election officials appointees of the governor. "We have no leverage—the secretary of state is toeing the Republican line," says Cesar. Again. ■

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Idiot Boxed

One big reason Bush won Florida? Television (prematurely) said he did. By 2001, red-faced network news honchos promised big changes for 2004. Now we're here. And guess what?

BY ROB GARVER

THERE WAS PLENTY OF HUMILIATION TO GO AROUND IN the aftermath of the 2000 elections. Vote counters and ballot designers, election boards and state legislatures all came in for heavy criticism. But special ignominy was reserved for the five major broadcast and cable networks and their news operations. The networks that night broadcast multiple incorrect reports, including the premature and still-disputed claim—initiated by FOX at 2:15 a.m.—that George W. Bush had won the state of Florida. "It was the most embarrassing evening in the history of network TV, politically," says Tom Rosenstiel, director of the Project for Excellence in Journalism. "They just embarrassed themselves and failed in the basic public-interest obligation they have come to have over the years."

The great sin of election night 2000, in the view of Rosenstiel and others, was that the television networks had broken one of the cardinal rules of journalism: Never rely on a single source of information when a second is available. That night, two organizations, The Associated Press (AP) and the Voter News Service (VNS), were tabulating vote results across the country. The AP was producing generally accurate numbers, but the network decision desks—the people who decide when to declare winners in different races—were looking only at the VNS data. After all, the VNS was theirs: It was the consortium into which the networks had all pooled money after they abandoned their own separate vote-tabulation projects as too expensive the decade before. Unfortunately, the VNS data were badly flawed. It was the VNS numbers that led FOX—whose data-analysis division that night was headed, incredibly (or incredibly for any place but FOX), by a first cousin of George W. Bush named John Ellis—to call Florida, and thus the presidency, for Bush. The other networks quickly followed suit. The call was retracted hours later, but not until long after it had registered its impact: For the next 35 tortuous days, Bush was the presumed president-elect, and Al Gore the presumed sore loser.

The networks engaged in much public hand-wringing in the weeks that followed the elections. Anyone who remembers a rueful Dan Rather saying, "If you're disgusted with us, frankly I don't blame you," or who saw network executives go to Capitol Hill to explain themselves to Congress could reasonably have assumed that steps would be taken to ensure that such a debacle would not happen again. Network executives later acknowledged that cross-checking the VNS data with the AP's numbers would probably have prevented the incorrect call of Florida for Bush, and they promised to make certain that a single source with bad information could never again create a media-wide failure like election night 2000.

So here we are, just weeks away from November 2, 2004, and the situation is this: On election night, once again, the networks will be relying on a single source for vote tallies.

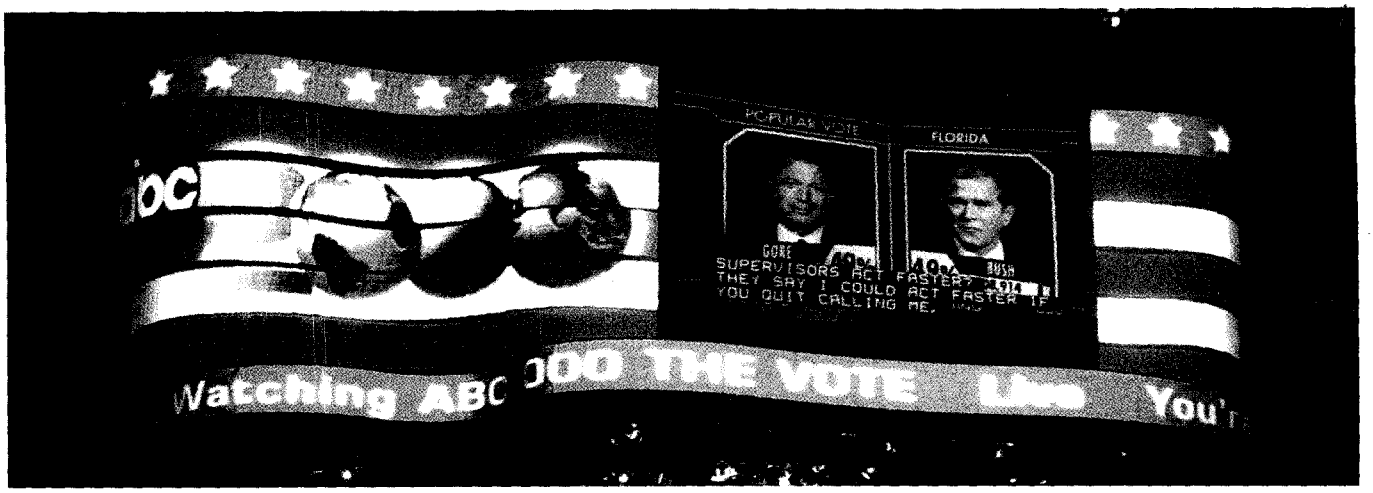
Instead of making certain that their decision desks will have two independent sources of information for vote tallies this year, the networks, in an effort to control costs, have completely eliminated one of the two vote-counting organizations that was operating in 2000. The result is that rather than fixing the system, the networks have hardwired it to produce a single source of vote tallies, ensuring that they will face the same situation that caused the largest of the election-night errors—the "most embarrassing evening in the history of network TV, politically"—four years ago.

ON ELECTION NIGHT 2000, THE VNS RAN A VOTE-TABULATION operation that focused on "top-of-the-ticket" races: the presidency, governorships, and House and Senate contests. The AP ran a parallel vote count that included all the races covered by the VNS as well as state legislative races and some local elections.

In the hour leading up to the networks' unanimous declaration that Bush had won Florida and the general election, the VNS and AP vote counts began to disagree wildly. As late as 1:02 a.m., the AP's data had indicated an almost 113,000-vote lead for Bush. But from that point on, the margin began to narrow quickly and dramatically. By 1:12 a.m., the Bush lead had fallen to 82,000 votes. Ten minutes later, it stood at 63,000. By 2:02 a.m., it had dropped to 56,000.

The VNS data, meanwhile, were telling a very different story. At 2 a.m., VNS data indicated that, with 96 percent of precincts reporting, Bush led by about 29,000 votes. Five minutes later, the Bush lead jumped to 51,000. The 22,000-vote swing would later be found to have resulted from a data-input error in Volusia County, which actually subtracted votes from Gore's total and added votes to Bush's.

At 2:12 a.m., the AP count dropped the Bush margin to 48,000 votes, many of them, according to the AP, in the Democratic southern part of the state; and with more than



America Decides?: The networks' incorrect call of Florida for Bush established him as the presumptive winner for the next 35 tortuous days.

200,000 votes still uncounted, a Gore victory was still possible. But the VNS held steady, now reporting a 51,433-vote edge for Bush and estimating that fewer than 180,000 votes remained uncounted. So at the exact moment that Bush's lead was dwindling according to the AP's tabulations, the networks were preparing to call the state for Bush. At 2:15 a.m., FOX News went on the air and declared that Texas Governor George W. Bush had defeated Vice President Al Gore by a slim margin in Florida, winning the state's coveted electoral votes and thus the presidency.

One minute later, the AP discovered the error in Volusia County and corrected it, resulting in the Bush lead declining further still, to 30,513 votes. This difference was now within the margin of error of the networks' statistical models, making any projection very dangerous. But in a headlong rush to follow FOX, the other TV networks weren't looking at the AP data, and they fell in line. With the VNS data still uncorrected, NBC called the race for Bush at 2:16, CBS and CNN (which were sharing a decision desk) called it at 2:18, and ABC called it at 2:20.

At 2:22 the AP again revised its numbers, and the Bush lead fell to 15,359 votes. The VNS continued to show Bush with a much larger lead, failing to correct for the Volusia County error until 2:51 a.m.

The concern that pressure not to fall behind their competition was responsible for the other networks calling the race immediately after FOX did was brushed aside by the networks, most of which claim to this day that when FOX made the call, they were within minutes of doing the same themselves. "You were keeping track of what other [networks] were doing," says Dan Merkle, who worked at the ABC decision desk in 2000 and will be its director this November. "But looking at the numbers, it was pretty close. If FOX hadn't done it somebody else would have, maybe a few minutes later."

Indeed, to many network officials, the question of competitive pressure on election night 2000 seems overblown. Linda Mason, CBS vice president for public affairs, believes the fact that nobody on the CBS/CNN decision desk checked the AP's numbers is far more bothersome. "I am not sure why they didn't use [them]," Mason told me. "They were using the tried and true numbers that they had used in the past, and they thought they didn't need anything else.

NETWORK EXECUTIVES EXPRESSED CONTRITION DURING congressional hearings that followed the election. In February 2001, CBS News President Andrew Heyward sat beside his counterparts at hearings before the House Energy and Commerce Committee and told lawmakers, "CBS News and the other network news operations made very, very serious mistakes that night, and they are mistakes that all of us at the table, and certainly I, deeply regret." Roger Ailes, chairman and CEO of FOX News, blamed incorrect data from the VNS. "As FOX relied on those numbers," he testified, "we gave our audience bad information. Our lengthy and critical self-examination shows that we let our viewers down. I apologize for making those bad projections that night." He concluded, "It will not happen again."

The networks all promised to institute rules for their election coverage that would reduce the possibility of bad calls in the future. They pledged to take steps to insulate their decision desks from the pressure to call races sooner than they want to just because another network has already done so. And one by one, the network chiefs also assured Congress, either explicitly or implicitly, that in the future they would use more than one source to gather vote-tabulation data. "We also need to make certain that we use supplementary sources of data as a way to verify the accuracy of the information we get," said NBC President Andrew Lack.

They may have meant it at the time, but after another spectacular failure by the VNS in the 2002 election, when a computer crash rendered all of its exit-poll data unusable, the equation changed. The networks collectively abandoned the VNS and created a new entity: the National Election Pool (NEP). Made up of the five major networks and The Associated Press, the NEP provides its members, as well as other news organizations that subscribe to its service, with exit-poll data and vote counts on election day via a secure Internet connection. The NEP is, in effect, a sort of shell of the old VNS into which new exit-polling and vote-counting operations have been inserted. Rather than try to reconstruct the VNS exit-polling operation, the NEP hired veteran exit-polling specialists Warren Mitofsky, of Mitofsky International, and Joe Lenski, of Edison Media Services, to collect the data for the coalition. The NEP also chose to abandon the old VNS vote-counting structure in favor of contracting with the AP

to provide tabulations, throwing the possibility of a two-source system out the window. The decision, many network officials said, was largely financial.

"I think we made a choice between trying to finance two discrete systems completely independent of one another and investing heavily in a single system with redundancies, quality controls, and built-in system checks," says CNN political director Tom Hannon. "We came to the conclusion that we got the more reliable product, instead of investing in two lesser models, by combining them into a single system."

The explanations have not satisfied many longtime journalists, who disdain the networks' decision to go with a single source. "It must be recognized that networks will not spend the money necessary to follow one of the most basic rules of reporting: two sources. That's a business decision, not a journalistic one," says Joan Konner, professor and dean emerita of Columbia University's journalism school and one of the co-authors of a post-election review of coverage commissioned by CNN. "The networks say it's too expensive, but when you look at the size of their parent corporations, it's chump change," adds Philip Meyer, Knight Professor of Journalism at the University of North Carolina at Chapel Hill and a Pulitzer Prize–winning reporter. "When the networks cover election night, having different organizations doing it with different methods, we always had some reason to be suspicious if they came out with different results. There was always a check on everyone—they checked each other. Having a single source for information is not good in a democracy."

Yeah, Right: FOX's Roger Ailes tells Congress it won't happen again.

AT FIRST, SAYS LINDA MASON OF CBS, NOW A MEMBER OF the NEP's board of directors, the AP was "a little reluctant" to be the only source of vote counts. The wire service considered creating an entirely separate system for collecting vote tallies, in order to provide a check on the possibility of input errors, but found it was too costly. "It's extremely expensive," said Tom Jory, the AP's director of election tabulations. "There are 4,600 counties, which means 4,600 people out there on election night. To double that, not only is it extremely expensive but it really doesn't buy you that much."

Instead, the AP has increased its investment in its existing vote-tabulation infrastructure, creating redundant systems centered in New Jersey and Missouri. It has built-in, sophisticated statistical-analysis processes designed to detect and flag possible errors. In addition, editors familiar with each state's history and politics will be assigned to monitor the vote-tabulation results, and to be on the lookout for anomalies that aren't caught by the system. Jory said the AP is well aware that it will be operating "without a safety net" on election night. "Obviously, anytime you are in a position like this you are apprehensive, but we are confident that we can do it," he insists.

It's true, of course, that it was the AP that had it right about Florida last time. But there are reasons why that fact should not translate into complete confidence in the system that the wire service has set up for this November. The AP's two redundant systems will still be working from the same inputs, meaning that if bad data should somehow get into the tabulations, that redundancy won't be much help—and might even hurt by appearing to validate incorrect information.

Consider the not-so-remote possibility that the 2004 presidential election hinges on the result in a single state, with an electorate closely divided between Democrats and Republicans. Say, for the sake of argument, that it's Florida.

The most favorable re-count scenario for Bush in the aftermath of the 2000 election found that his final margin of victory over Gore in Florida was 537 votes. Multiple other re-counts found smaller margins or determined that Gore, in fact, received more votes than Bush. In any case, the difference between the candidates in Florida, as a percentage of the 5.96 million votes cast, was so small as to be statistically insignificant.

The safeguards put in place by the AP are statistics-based systems. A vote total from a particular precinct that is significantly different, in a statistical sense, from totals in previous elections or from results predicted will raise red flags. For instance, the Volusia County error that caused confusion on election night would be flagged immediately by such a system. But errors of smaller magnitude would not. And in 2004, as in 2000, errors of small magnitude may be more than enough to create the temporary impression that the wrong candidate has won.

The temporary impression of victory in 2000 proved invaluable to George W. Bush, constituting the greatest windfall for a candidate from a few moments of television in American political history. The short-term anointing of Bush created what political consultants call a "frame"—basically a starting set of assumptions for the public debate that would follow. An independent report commissioned by CNN in the weeks after the election described it this way: "The unanimous network calls for Bush created a premature impression that Bush was the winner in Florida. That characterization

carried through the post-election challenge. Gore was perceived as the challenger and labeled a 'sore loser' for trying to steal the election."

Political campaigns spend millions of dollars on advertising, and an equally impressive amount on political operatives, to try to frame issues to their advantage. But in the 2000 presidential election, the Bush campaign got the frame of its dreams, and it got it for free. Right down to Dan Rather advising CBS viewers, "Hang it on the wall. George W. Bush is the next president of the United States," the Bush campaign could not have asked for anything more.

THERE DO EXIST REASONS TO BE HOPEFUL THAT THE NETworks will be more cautious in November than they were four years ago, and that an early call by FOX won't set the dominoes tumbling the way it did in 2000. While none of the network officials interviewed for this story would specifically point to FOX as being a weak link in the chain, it seems clear that they all view its decisions as suspect. Several noted that during the 2004 Democratic primaries, FOX seemed most eager to push the envelope in terms of predicting winners early, often leaving the other networks shaking their heads at the willingness to risk another wrong call so soon after 2000. (FOX officials refused multiple requests to provide comments for this story.)

Second, during the Democratic primaries, there were often significant lags between the various networks' projections of winners in some states. One of the most significant was on Super Tuesday, when FOX made an early projection that John Kerry would carry Georgia. "The numbers seemed to indicate that ultimately Kerry [would] be the victor, but that there was a reasonable chance that [John] Edwards would win," recalls CNN political director Tom Hannon. "So, under the circumstances, we were not going to make that call when there was a likelihood that it would be wrong." So, the networks vow, they've learned their lesson. "I think it is fair to say that the primaries indicated, and the general election will indicate, that everyone—or most everyone, at least—is going to be extra cautious in states where the vote is close," says NBC Vice President Bill Wheatley.

This sounds like good news to many who criticized the networks' performance in the aftermath of the 2000 election. But the primaries aren't the presidential election, and it's fair to ask if, when the pressure is truly on the decision desks, the networks will really be able to resist making a call when one of their competitors has already done so—using bad information, hasty analysis, or their own ideological preference.

This has got to be avoided, not only because the networks played a role in easing the current occupant of the White House into office four years ago but because what remains of the public trust of the news media could be irreparably shattered by a recurrence. The networks need to recognize that the "disgust" that Dan Rather worried about in 2000 would be transformed into something of a completely different magnitude if they inject themselves into the electoral process again this November. ■

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Health Care's Big Choice

As family premiums push $10,000, Bush and Kerry promote radically different proposals.

BY PAUL STARR

The American health-care system is again at a point of critical change as a result of escalating costs and a gathering movement among employers, insurers, and policymakers to revamp the structure of health insurance. Like the spread of managed care a decade ago, the new changes will be a bitter pill for many people. Most Americans, however, don't know what is in the works or what fundamentally different choices about the future of health care the two presidential candidates are offering them.

During Bill Clinton's second term, health-care inflation slowed to a crawl as the economy grew rapidly, but under George W. Bush those conditions have been reversed: Health costs and insurance premiums have soared in a slow economy. Median family income fell 3 percent between 2000 and 2003 as a result of the recession, while health-insurance premiums rose 10.9 percent in 2001, 12.9 percent in 2002, 13.9 percent in 2003, and 11.2 percent in 2004, according to surveys by the Kaiser Family Foundation and the Health Research and Education Trust (HRET). Average family premiums hit a staggering $9,950 this year. Unsurprisingly, as insurance has become more costly, the number of people without it has climbed—up by 5 million to 45 million since Bush assumed office, according to the latest Census Bureau data from an annual survey conventionally used to measure health coverage.

Moreover, the rising cost of health insurance has reportedly made employers that do offer coverage reluctant to add new full-time jobs. (In 2003, employer contributions averaged $6,656 for family coverage and $2,875 for single workers.) High health costs have become a particularly serious drag on employment in economic sectors such as manufacturing that have historically provided good jobs with benefits. According to the Kaiser–HRET survey, health insurance came with 5 million fewer jobs in 2004 than in 2001.

From 1990 to 1992, during the first Bush administration, the same combination of high health-care inflation, sluggish economic growth, and rising numbers of people without coverage created tremendous pressure for reform and reorganization. Clinton's reform efforts failed, but employers and insurers reorganized the system through the introduction of managed care. Though that shift didn't help the uninsured, it provided some temporary relief from rising costs. But after provoking a backlash from both patients and providers, many health-maintenance organizations and other managed-care plans in the late 1990s relaxed the controls they had earlier imposed. Growing combinations of hospitals and other providers also impeded price competition. Many analysts now believe that the managed-care revolution yielded one-time-only savings, primarily by ratcheting down levels of hospital use.

As a result, employers and insurers are facing the current surge in costs without much hope that they can contain it with measures aimed at doctors and hospitals. Instead, they are focusing on consumers and moving toward scaled-back forms of coverage with higher deductibles and co-payments. Such measures not only shift costs from employers to individual consumers but are also aimed at forcing patients to economize on the services they use. Compared with people in other advanced countries, Americans do not actually see doctors more often, obtain more prescriptions, or spend more time in hospitals. Health-care costs run much higher in the United States not because of higher volume but because of greater technological "intensity" and higher prices (prescription-drug prices have become a familiar example of the latter phenomenon).

Nonetheless, exposing consumers directly to more of the price will cause them to cut back on certain kinds of services, including some that are medically necessary. Many people have already seen their deductibles rise from $100 to $300 or $600 (often with separate deductibles for hospital care) and their co-payments for doctor visits jump from $10 to $20 or $40. At the extreme, this approach calls for annual deductibles on the order of $2,000 or more, perhaps combined with a health savings account (HSA) to which an employer may (or may not) make a contribution, perhaps up to half the amount of the deductible.

The advocates of this approach call it "consumer-directed health care," a term that puts the best face on a change otherwise likely to be unpopular and that embraces several types of insurance. Some insurers, for example, are allowing

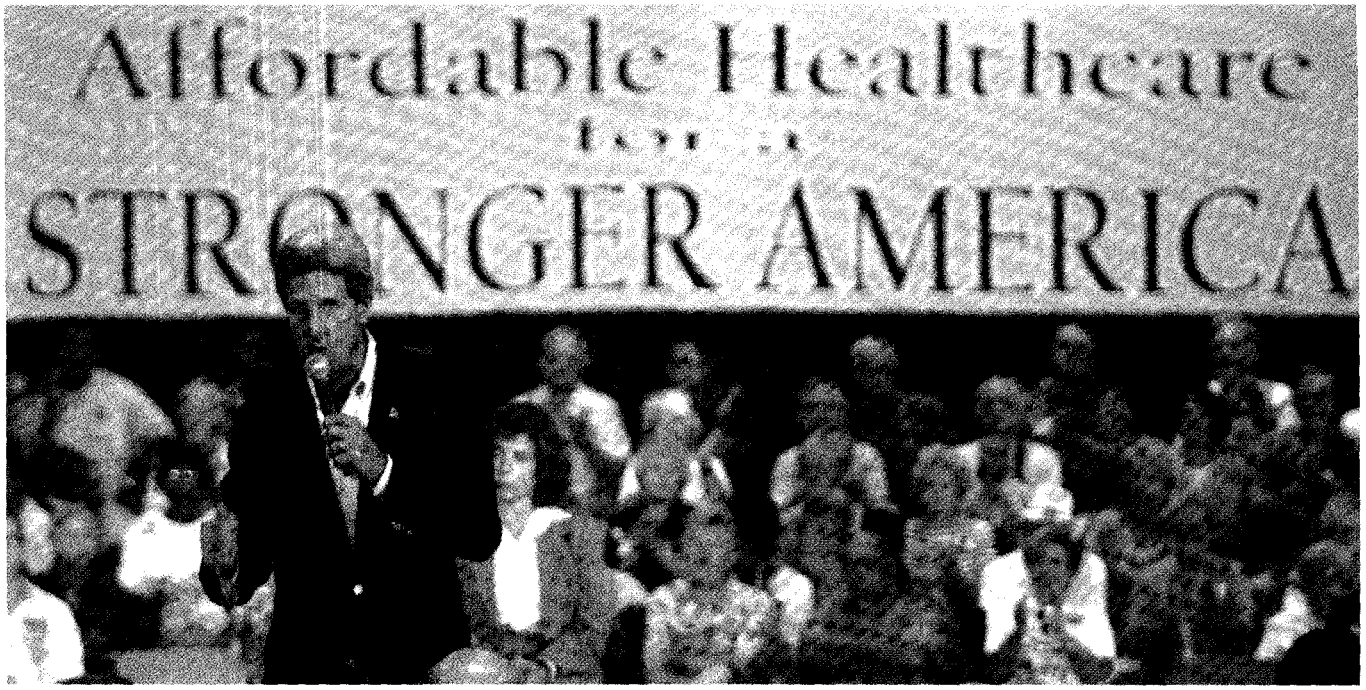
individual employees to customize their plans by choosing from a menu of deductibles, co-payments, and other features. Some have introduced "tiered networks," which call for classifying doctors and hospitals in several groups, with consumers paying relatively more to use providers in higher tiers. These approaches, like the high-deductible plans, are "consumer-directed" in the sense that consumers make choices under the economic constraints that insurers and employers have devised.

The measures proposed by President Bush would extend and accelerate this shift; indeed, the model that he and other Republicans have been promoting is a high-deductible plan with an HSA. The legislation passed last year for Medicare prescription drugs included an unrelated provision authorizing portable, tax-exempt HSAs, and this year Bush is proposing to make the premiums for high-deductible insurance 100-percent tax deductible. These provisions would give the high-deductible/HSA option greater tax advantages than exist for any other kind of insurance.

In addition, Bush would provide tax credits to low-income individuals for the purchase of health coverage: $3,000 for a family of four with an income below $25,000, falling to $1,714 at an income of $40,000. These tax credits are estimated to cost $85 billion over 10 years, but given how much insurance actually costs, the impact would be modest: According to a study by the Kaiser Family Foundation, the credits would reduce the 45 million uninsured by 1.8 million—a gain that would likely be wiped out soon with continued growth in insurance premiums.

The high-deductible/HSA option will be chiefly attractive to healthy people in higher tax brackets who may not need medical care in a given year and can roll over their untaxed savings. But it will hold little appeal for those with chronic illnesses or families with children, who are likely to be stuck with larger out-of-pocket expenses than under a conventional insurance plan. Nor will the high-deductible/HSA option appeal to people with low to moderate incomes, who will not realize significant tax savings but expose themselves to risks of bigger medical bills.

In any given year, roughly two-thirds of subscribers to a typical insurance plan are healthy and make relatively little use of their coverage, while the remaining third experience significant acute or chronic illness, with 1 percent suffering from catastrophic conditions that account for a major share of total expenditures. Insurance works, of course, because the healthy subsidize the sick. The HSAs, in contrast, allow the healthy to keep funds out of the general pool and to save them individually. To the extent that healthy, low-risk people opt for high-deductible plans with HSAs, the cost of other forms of insurance will necessarily have to climb. Over time, many people who would not otherwise want a high-deductible plan may well find they have no other choice.



Healthy Savings: Kerry's stop-loss protection would cut premiums by 10 percent. Other provisions would cut the uninsured by 27 million.

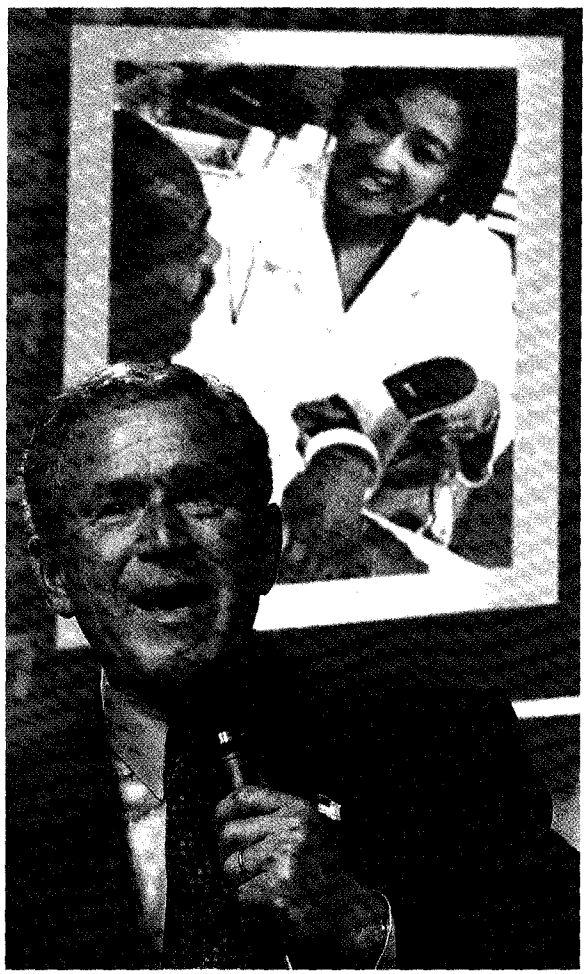
KERRY'S "AMBITIOUS INCREMENTALISM"

While the Bush approach puts more of the onus of cost on the individual, John Kerry's proposals aim to reduce and spread the costs of health insurance. Some provisions would make private plans more affordable, while other elements would expand public programs for low-income people. Kerry's plan, unlike Clinton's in 1993, calls for little institutional change and does not include any mandates. It uses new financing to stabilize and extend existing forms of coverage and to create incentives for greater efficiency. In this sense, his program is incrementalist—"ambitious incrementalism" is the term that some have used to describe it. According to estimates by Kenneth Thorpe of Emory University, Kerry's proposals would cost $653 billion over 10 years and result in coverage of 27 million of the nation's 45 million uninsured, raising the proportion of Americans with health insurance to about 95 percent. Unlike Bush, Kerry

indicates how he would pay for his plan: The required revenue would come from rolling back the Bush tax cuts for the top 2 percent in income.

To cut private insurance premiums, Kerry proposes that the government provide "stop-loss" protection to private plans, picking up 75 percent of the cost of catastrophic care. The threshold for this protection would be set so as to relieve private plans of 10 percent of their costs. In 2006, that level would be $30,000 in annual expenses for an individual, rising to $50,000 in 2013. Employers that wanted to get the stop-loss protection would need to have a certified disease-management program (aimed at controlling expenses and preventing recurrences for specific high-cost conditions such as heart disease). They would also have to offer health coverage to all their employees on a nondiscriminatory basis—that is, if they pay 75 percent of premiums for some employees, they would have to extend the same offer to all.

The stop-loss protection would have benefits to the public beyond the immediate savings of 10 percent. Reducing the risk of high-cost cases would make it less risky, and therefore cheaper, to insure small firms. All employers would have less incentive to discriminate against job seekers who are older or disabled or who have family members suffering from costly medical conditions. In the past, Blue Cross plans used to offer a single "community rate" to all firms, large and small. Competition did away with that practice. Under Kerry's proposal, the government would, in effect, restore "community rating" for catastrophic medical care.



Saving the Healthy: Bush's accounts will cut transfers to the sick.

In another measure aimed to increase the pooling of risk, Kerry would use the framework of the Federal Employees Health Benefit Program to create a national pool open to all employers to buy insurance. The federal program today offers government employees, including members of Congress, an array of private health-insurance plans (indeed, it has long been cited as a model of "managed competition"). Under Kerry's proposal, private employers could also purchase health coverage through a parallel, albeit separate, pool.

Kerry would also extend substantial tax credits to enable the unemployed and small businesses to buy insurance. Currently, those who lose jobs with health benefits have a right to buy COBRA coverage for up to 18 months, but they usually must pay for it entirely on their own. Kerry would give the unemployed a refundable tax credit for health insurance equal to 75 percent of their COBRA premium. His plan also includes tax credits to cover up to 50 percent of premiums for employees of small businesses, scaled according to their wages.

Kerry's primary means for reducing the number of uninsured, however, is a major expansion of public coverage. Since 1965, Medicaid has been the primary channel for financing health care for people with low incomes. The federal government sets minimum standards and provides much of the money, but the states run their own programs at varying levels of inclusiveness and generosity. In 1997, Congress added a second federal-state program to expand coverage of children, but both Medicaid and the State Children's Health Insurance Program have suffered from cutbacks in recent years.

Under Kerry's plan, the federal government would pick up all the costs for insuring the 20 million children from families with incomes below the poverty line ($18,811 for a family of four in 2003). The states would then extend eligibility to children in families with incomes up to three times the poverty level; children in school would be automatically enrolled if their parents did not report other health coverage. As a result of these measures, coverage of children would come close to universal.

With federal money, the states would also expand Medicaid coverage of parents with incomes up to twice the poverty level and other adults up to the poverty line. Kerry's proposal also includes federal bonus payments to states as they meet enrollment targets.

The combination of provisions in Kerry's plans helps to address the risk that expanded eligibility for Medicaid would lead employers to drop coverage of low-wage workers. Small businesses would receive substantial tax credits to cover low-wage employees. If firms wanted to get the stop-loss protection under Kerry's plan, they would have to offer the same coverage to all their workers. Some firms could decide to forgo stop-loss protection rather than cover all their employees; in that case, they would be "paying for" Medicaid through the stop-loss subsidies they give up.

There is, however, an unresolved problem with the use of the federal employee program as a framework for a national insurance pool. Because participation in the pool would be voluntary, the employers most likely to use it would be those with older, higher-cost workers. In pricing coverage for the pool, health insurers would necessarily adjust their rates upward to reflect that risk. The national pool, however, would

cost less to administer than plans purchased by small firms through insurance brokers. The program could also attract healthier employee groups if the small-business credits in Kerry's plan were at least partially contingent on use of the national pool. Many such details will need careful analysis if Kerry is elected and the program gets turned into legislation.

The chances for enacting Kerry's proposals depend, of course, on control of Congress. Progress will certainly be difficult if voters elect Kerry while returning a Republican congressional majority. But one difference from the Clinton plan is that Kerry's proposals are more easily divisible; they could be enacted piece by piece over an extended period. Most of the package could be included in budget bills needing only a simple majority in the Senate instead of 60 votes. While Republicans characterize the Kerry plan as a government takeover of health care, some on the left will be dismissive precisely because it isn't. But unlike more radical proposals such as single-payer national health insurance ("Medicare for all"), Kerry's approach is politically plausible.

Kerry's health plan is his single biggest domestic initiative, but it has received little media attention.

Ten years ago, opponents of reform were able to portray the Clinton health plan as a threat to Americans' existing coverage; Kerry's proposals, however, would unambiguously help Americans keep coverage that is otherwise slipping away from them. The provisions for stop-loss protection have an appeal that extends across the board, including to business. Although Kerry's support for government-negotiated prices for prescription drugs will certainly meet opposition from the pharmaceutical industry, the rest of his program does not threaten the insurance industry, physicians, or small business—traditional opponents of reform. An executive of one insurance company told me recently that Kerry's plan, especially the stop-loss proposal, is "fantastic" for his firm, but not to expect the company to say so publicly. The ties between business and the Bush administration are too strong for Kerry's health proposals to make much difference in business support during the campaign. But if elected, Kerry may be able to build a broad coalition in support of his plan.

Some journalists have said during this presidential campaign that neither candidate has any important domestic proposals. Kerry's health plan is his single biggest domestic-policy initiative, accounting for most of the new spending he is proposing. Indeed, he has told *The New York Times* that the health proposals would take precedence over balancing the federal budget. He has held numerous events to publicize his position on health care and, through publications on his Web site, offered far more details about his health reforms than any previous candidate (including Clinton in 1992). Kerry's proposals have nonetheless received little attention in the media. With time running out before the election, it remains to be seen whether the public will hear any sustained discussion about the two candidates' views on health care, even though the voters' stakes in the outcome are enormous. ■

Good Medicine

Medicare *does* need changes. But its expansion is the key to eventual universal coverage.

BY JACOB S. HACKER AND MARK SCHLESINGER

ACROSS THE POLITICAL SPECTRUM, ALARM BELLS ARE ringing about Medicare, America's giant health program for the aged and disabled. To conservatives, Medicare is a huge, Kremlin-esque bureaucracy destined to soak up more and more of the American economy. To critics on the left, it's an inadequate program that nonetheless siphons off increasingly limited funds that could be used to broaden coverage for children and working families.

The White House–backed Medicare reforms passed late last year only confirmed each side's worst fears, promising a meager and ill-designed drug benefit at a hugely inflated price. While millions go without basic coverage and budget deficits explode, critics asked how we can countenance pouring hundreds of billions of dollars into a system for the aged that already provides pretty decent protection.

Here's how: Make improvement and expansion of Medicare the route to universal health coverage in the United States. Medicare *does* badly need upgrading. Medicare *does* do too little to help the non-elderly. But the solution isn't to tear down Medicare; it's to build up the program to make it a stable foundation for providing health care for all Americans without access to good workplace coverage. In all the talk about skyrocketing health costs and the uninsured, everyone seems to have forgotten about the one program that can realistically get America to affordable universal insurance in the coming decades.

Ironically, the potential for expanding Medicare to all Americans owes much to past initiatives—mostly pursued by conservatives—that have enhanced beneficiaries' enrollment in private health plans. For all their shortcomings, these proposals have made it possible for Medicare to offer a broad array of private plans, as well as traditional fee-for-service insurance, to young and old alike. But this strategy will succeed only if Medicare also continues to provide the broad risk sharing that is vital to the program's long-standing success—and to the future of American health insurance.

FOR A PROGRAM SO LOVED BY THE PUBLIC THAT EVEN anti-government ideologues tread lightly around it, Medicare has come in for a surprisingly heavy critical barrage. The fusillade consists of two main volleys: that America can't afford Medicare and that the program is built on an irremediably antiquated model. Each of these claims is arresting and superficially attractive. Yet each is wrong, both in its diagnosis and in its prescriptions.

Affordability is the more bipartisan concern—and the one with the stronger basis in fact. The aging of America and the rise of health costs promises to make Medicare much more expensive in the future. According to some estimates, Medicare could represent as much as 7 percent of the economy in 2050, up from about 3 percent today.

All of this is cause for concern, but by no means despair. In the last half-century, the United States has experienced swings in social spending much larger than those predicted by even the direst estimates, with nothing like the crises now prophesied. More important, while Medicare will cost more in the future, Americans will also be much richer, allowing them to devote a larger share of income to it. The issue isn't whether we can pay for Medicare; it's whether we want to. And polls resoundingly indicate that nearly all Americans do.

What's more, the frightening image of Medicare sucking away nearly a tenth of the national income isn't likely to materialize. Every previous Medicare spending "crisis" has prompted serious and effective efforts to rein in costs without cutting benefits. A number of European countries, moreover, are much farther along the demographic road to gerontocracy than is the United States, yet have still sustained their publicly funded health benefits without having medical spending take a larger share of the national income or restricting access for older patients to a level below Medicare's current coverage.

Lurking beneath claims about affordability is the seemingly fixed American belief that all government programs are less efficient and more costly than their private counterparts. That's simply not true of Medicare. In fact, Medicare has contained its spending better than has private insurance over the past two decades. Nor have politicians given away the bank to older Americans. Medicare is remarkably less generous than typical private health plans. A private plan with Medicare's current benefit package would cost about $2,300 for a single non-aged adult, compared with a current average for private plans of about $3,600 with the sort of benefits negotiated at the typical workplace.

Of course, to some, this is the real problem: Medicare is just an outdated model, period. The complaints take many forms—Medicare has an antique payment policy, it doesn't effectively "manage" care, it makes patients pay too much

out of pocket—but most of these criticisms boil down to a simple battle cry: Medicare needs radical modernization to encourage competition and incorporate the private sector more fully.

This call was most alluring during the mid-1990s, when managed-care enthusiasts promised that their plan would decisively rein in costs and stimulate innovative service delivery. Of course, that was before the managed-care backlash sent private insurers scurrying back to arrangements that allow free choice of providers and require cost sharing by patients—in short, the very model that old-fashioned Medicare has retained all along.

Medicare could certainly be a more effective insurance program. It should better manage chronic medical conditions, for example, and provide more extensive preventive outreach and better coverage of rehabilitative services. But there is nothing inherent in the Medicare model that makes these innovations less possible than in the private sector. And when it comes to providing timely access to care and financial security, recent surveys of Americans' health-care experiences suggest that conventional Medicare considerably outperforms the average private insurance policy.

Indeed, it's crucial to recognize that today's Medicare is very different from the model of 30 or 40 years ago. That's because Medicare now allows beneficiaries to choose among a growing variety of private managed-care and fee-for-service options. And these choices meet with overwhelming popular approval: Two-thirds of all Americans favor giving Medicare beneficiaries a choice among insurance plans so long as this does not increase the cost of staying in the conventional Medicare program.

BUT WAIT, HAVEN'T PRIVATE HEALTH PLANS FAILED Medicare? Stories of them pulling out in droves and increasing deductibles certainly suggest so. But the disruptions of recent years can be exaggerated. At its peak, the turnover rate of plans in Medicare was about the average experienced in the much-lauded Federal Employees Health Benefits Program. Meanwhile, the rewards that private plans have delivered to the program are often neglected. For many beneficiaries who have enrolled in private plans, the broader coverage and coordination of care that private plans can offer has been a boon.

Still, private plans have caused special problems for Medicare's beneficiaries. The aged are an especially difficult group to offer a choice of health plans, not so much because their average costs are higher but because those costs are especially concentrated and catastrophic. This creates a powerful incentive to "cream skim" the healthy and exclude those with more serious and costly health-care needs.

Churning of private plans in and out of Medicare also hits the elderly and disabled particularly hard because it tends to disrupt the continuity of care that is essential for effective treatment of chronic problems. And most of the elderly now in Medicare have little familiarity with private plans, limiting their ability to anticipate these sorts of problems.

Fixing Medicare's system for paying private plans would help considerably. Currently, Medicare essentially pays all plans that want to participate in each region the same amount—pegged to the average cost of seniors in the traditional fee-for-service program. The incentives for plans are clear: attract healthier patients, and enter only regions where payments are high. The goal should instead be a level playing field in which plans attract patients only by delivering things that beneficiaries find of value—convenience, coordination, integrated benefits, low cost sharing—not by gaming the system.

Ah, Memories: Lyndon Johnson signs the Medicare bill, 1965, as Hubert Humphrey and Harry Truman look on.

A level playing field is decidedly not, however, what the 2003 Medicare legislation contained. It's already clear that the 2003 reforms will be a disaster when it comes to providing drug coverage. But as bad as the drug benefit is, the way in which the bill coddles the private sector is even more troubling. Under the legislation, private plans will get huge new subsidies to encourage their participation in the program, even though recent studies indicate that private plans continue to be overpaid when the healthier mix of patients they enroll is taken into account.

If that weren't enough, drug coverage under the bill *must* be provided by private insurers. Except in regions where private plans don't emerge, beneficiaries cannot get drug coverage through Medicare itself. And even in such regions, Medicare is prevented from actually serving as a purchaser—it bears the risk, but farms out management to the private sector. This also means, of course, that Medicare has no bargaining power under the bill to hold down skyrocketing drug costs.

Fixing Medicare to correct these egregious overpayments and to allow it to provide drug coverage directly is essential. But there's another important step that could and should be

taken to make private plans in Medicare work better: Expand it to the non-aged. Doing so would greatly even out the costs among subscribers by bringing in healthier younger Americans. It would reduce the prevalence of chronic illness among enrollees and introduce into Medicare a group of comparatively savvy consumers. Above all, it would make insurance more secure and affordable for all Americans, ensuring that workers and their families have access to a low-cost policy providing free choice of doctors and an effectively regulated system of private health plans.

IF THE GOAL OF EXPANDING MEDICARE SEEMS RADICAL OR strange, remember that when Medicare was enacted in 1965, almost everyone saw it as the first step to universal coverage. That didn't happen, of course, and now advocates of expanded insurance hardly talk about the program—or even see it as an obstacle. Yet, just as in 1965, Medicare remains today the most effective, most attractive, most viable avenue to reach universal health insurance in the United States.

It's also a big and costly federal program, which may be why advocates of universal coverage seem so reluctant to seize on its untapped potential. But this is exactly backward: The size and federal character of Medicare are its greatest assets as a platform for expanded coverage. State insurance programs vary greatly from state to state. Worse, they're "pro-cyclical," meaning they increase their spending when the economy is good and cut it back precisely when the need is greatest. These are not attractive features when trying to ensure health security, and neither would be true of a national program.

Expanding Medicare would powerfully link the health security of the elderly and the rest of America.

The assumption that Americans wouldn't accept a huge federal program called Medicare seems convincing—until one realizes that there already is such a program, it's called Medicare, and Americans absolutely love it. Medicare is among the most consistently popular programs in the United States, and its popularity has been enhanced by the addition of private-plan options, despite the evident problems with their implementation.

Indeed, many Americans don't even think of Medicare as a government program, as is suggested by the story of an elderly constituent who reportedly jumped up at a congressional town-hall meeting and declared, "Keep government out of my Medicare." Which is precisely why the program is such a good institutional route for expanding health coverage. Public-opinion postmortems suggested that Americans turned against Bill Clinton's health plan because Republicans were able to portray it as unfamiliar, unpredictable, and threatening. Medicare would not be vulnerable to the same attack.

But isn't Medicare the sort of dreaded single-payer plan that would place the government in charge of the entire health system? That might have been an effective retort a decade or two ago, but it's hardly relevant to the program that exists today, with its extensive private-plan options. Since polling on health care began during the 1930s, the public has been fairly evenly divided between approaches that rely on public and private insurance. Medicare, in its contemporary form, offers a balance between the two.

Essentially, the reform policy we have in mind would give employers the option of either providing basic coverage on their own or paying a premium based on their total payroll to purchase Medicare coverage for their workers. With the premium set at 5 percent of wages, estimates show that about 40 percent of Americans would be enrolled in Medicare, with the rest in employment-based health plans. The net cost would be roughly $85 billion. This compares favorably to John Kerry's plan, which would cover substantially fewer Americans for about $70 billion.

MAKING MEDICARE AVAILABLE TO ALL AMERICANS WOULD, in a single stroke, address many of the complaints that critics have raised. Though requiring new financing up front, this would greatly *lessen* Medicare's long-term cost problem because it would make program spending less sensitive to the demographic distribution of the American population. By increasing the share of health spending financed by Medicare, it would also give the government greater leverage to control costs. And by bringing in younger Americans, it would make it much easier to improve the program's reliance on private health plans.

But perhaps most crucial, expanding coverage to the uninsured through Medicare would powerfully link the health security of the aged and non-aged. No longer would young workers without insurance shell out payroll taxes to support elderly citizens with good coverage. And no longer would advocates of expanded insurance coverage feel that improving Medicare was at odds with their ultimate aims. Instead of simply making Medicare more like insurance for workers, *this* Medicare reform strategy would also make insurance for workers more like Medicare: secure, affordable, and simple.

To be sure, none of this would be easy. So far has Medicare drifted from the larger goal of universal coverage that advocates rarely mention the two in the same sentence. But the two should be spoken of together, for Medicare's future and the future of American health insurance are necessarily intertwined. The only question is whether Medicare and universal coverage will hang together or hang separately. We can preserve and improve Medicare for future generations and finally make health insurance secure for all Americans. Or we can leave each bobbing separately in a sea of hostility to the ideal of a shared fate that once fired enthusiasm for Medicare—and could do so yet again. ■

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Currents

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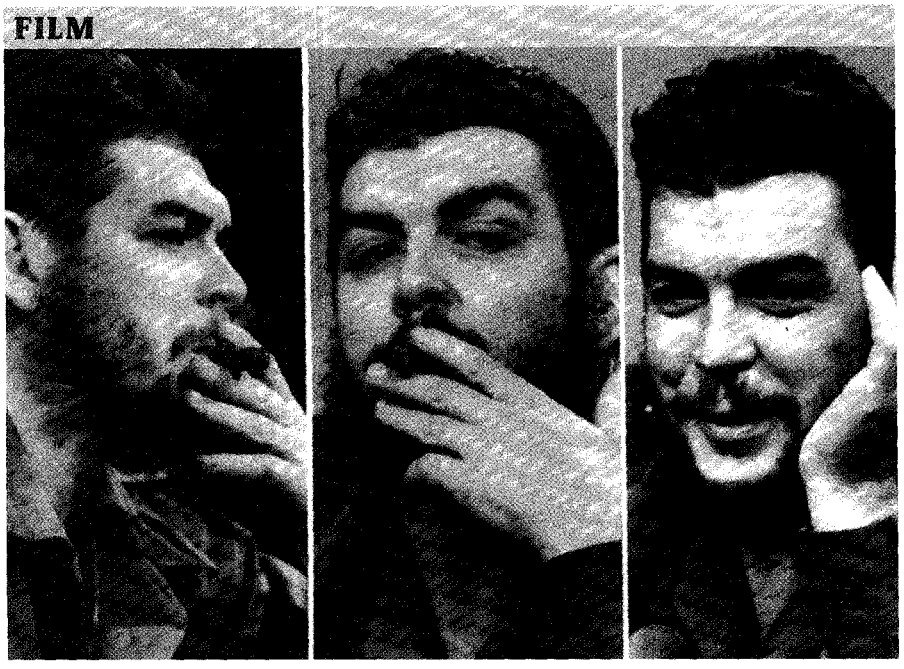

Star Power: Lefty icon Che Guevara was born the same year as Mickey Mouse and Andy Warhol. Coincidence?

Ernesto Goes to the Movies

The Motorcycle Diaries, brought to the screen by Robert Redford, shows us the young, pre-revolutionary Guevara. Call it soft socialist realism.

BY J. HOBERMAN

HE WAS, PER JEAN-PAUL SARTRE, "the most complete human being of our age." Not to be outdone, Susan Sontag eulogized him as "the clearest, most unequivocal image of the humanity of the world-wide revolutionary struggle unfolding today." He, of course, is Ernesto "Che" Guevara, although the key word in Sontag's formulation is neither "humanity" nor "revolutionary" but "image."

You could find that image at the heart of the Montreal Museum of Fine Art's recent show *Global Village: The 1960s*, on the wall of a room provocatively called "Disorder." The image graced the posters used to advertise the show, and it was reproduced ad infinitum in the museum gift shop, amply (and ironically?) stocked with all manner of Che Guevara tchotchkes. Is it Che who gives the lost world and failed aspirations of the 1960s a human face?

Che Guevara's posthumous role as an icon and fashion statement has now lasted twice as long as his political career. Born to a left-wing, upper-middle-class family in Rosario, Argentina, in 1928 (the same year as international icon Mickey Mouse and ultimate iconographer Andy Warhol), he was an international political celebrity before he turned 32, slyly smiling on the cover of *Time* magazine in August 1960, flanked by subsidiary images of powerhouses Nikita Khrushchev and Mao Tse-tung. That same summer, Cuban photographer Alberto Korda snapped a more flattering portrait of El Che, long hair topped by a perfectly placed black beret and flowing in the winds of change, gaze resolutely focused on anti-imperialist struggle.

Officially known as *Heroic Guerrilla*, Korda's picture might be the most famous and most appropriated photographic portrait ever (the inevitable late Warhol multiple was utterly redundant). It's also an image no mere mortal could live up to. Indeed, Che the revolutionary martyr was born October 7, 1967, when another photograph, this one amazingly Christ-like, flashed out of a Bolivian pueblo and around the world—"the corpse of the last armed prophet laid out on a sink in a shed, displayed by flashlight," wrote Robert Lowell.

Armed prophet of Third World upheaval, unlikely combination of Tom Joad and Mick Jagger, El Che imbued the revolution with a sense of archaic chivalry. It was while touring Europe in the aftermath of Che's death that movie mogul Darryl F. Zanuck became aware of the dead guerrilla's "tremendous appeal" for young people and instructed his son Richard to quickly develop a Guevara biopic with Omar Sharif in the title role. Released in 1969, the film was a cautiously pandering bore, anathema to both radical New Leftists and right-wing Cubans.

Che Guevara was not only a dorm-room pin-up to rival Jimi Hendrix, Janis Joplin, and Jim Morrison but the poster boy for repressive tolerance and co-

optive commodification. Hans Magnus Enzensberger's 1970 essay "Constituents for a Theory of the Media" cites the Olivetti Corporation's appropriation of Che's image for an ad celebrating its creative sales force: "We would have hired him" was the boldly tautological assertion. Before the '70s ended, Che was relegated to the attic of cultural memory—at least outside of Cuba. But with the end of the Cold War, the closest thing to a superstar that international communism ever produced re-emerged as a capitalist tool, emblazoned on a top-selling Swatch watch and otherwise used to sell shoes, beer, cigars, and skis. In a totally unexpected way, Che became the embodiment of free-market globalism.

In Cuba, where the day of his death is a national holiday, Che remains a revolutionary trademark and constant presence—the New Socialist Man, model for several generations of schoolchildren. But his cult of personality has long since ceased to be a function of state power. The old Che may linger still in Vietnam and Mozambique, among the Senderos and the Zapatistas; but in the Bolivian village where he was shot, he is Santo Che de La Huigera—believed to work miracles, his portrait juxtaposed with that of Christ in the local mercado. In Buenos Aires, Che enjoys a more secular beatification; his image signifies pure celebrity, appearing on souvenir stands in concert with those of two other hometown heroes, tango singer Carlos Gardel and Eva Peron. (And Evita herself—which is to say Madonna—dressed as Che for the cover of her *American Life* CD.)

Barack Obama has been called a political "rock star," but El Che is a *dead* political rock star—consigned forever to the hell (or purgatory) of images, his corpse to be endlessly consumed in the bistro that *The Simpsons* once termed "Chez Guevara" (or the London bar Che, or the Cairo theme boîte Che Guevara, where the waiters dress in uniformed black berets and the menus are for sale). Mike Tyson tattooed Che's image on his chest, former Senator Gary Hart published a pseudonymous novel titled *I, Che Guevara*; a Williamsburg (Brooklyn, not Virginia) children's boutique hawks baby-sized Che T-shirts. A "third way" fascist microparty has Che on its Web site. The guerrilla's trademark beret has been placed atop Taco Bell's talking Chihuahua. A Russian poster artist morphed *Heroic Guerrilla* into a character from *Planet of the Apes,* and the *National Review* used the same image to smear a doleful-looking John Kerry. Serious Che art—Jay Cantor's historical novel *The Death of Che Guevara*, Richard Dindo's documentary *Ernesto Che Guevara: The Bolivian Diaries* (and its avant-garde appropriation, James Benning's *Utopia*), Leonardo Katz's experimental film *El Día Que Me Quieras*—has tended to concern Che's martyrdom.

James Dean without self-pity, Jack Kerouac sans narcissism, young Che Guevara is a bit of a daredevil, yet he's sensitive enough to have his heart broken.

But that was before *The Motorcycle Diaries*. Withheld from publication until 1995 (and still omitted from Cuba's "authorized" Guevara canon), Che's rewritten journal of a youthful road trip taken in the company of fellow medical student Alberto Granado sold a fast 30,000 copies in a Verso paperback blurbed as "*Das Kapital* meets *Easy Rider*." A new generation of devotees was thrilled to discover the young Che as a romantic, poetry-reading hipster who, in the course of his bildungsroman across Argentina, over the Andes, and up Chile into Peru, discovers his Latin American identity.

The Motorcycle Diaries movie, which premiered at Sundance, competed in Cannes, and opens in the United States this month, was masterminded by its executive producer, Robert Redford, who recruited Brazilian director (and Sundance Institute alum) Walter Salles to make the film in Spanish, with a Latin American cast. Che, or "Fuser" as his comrade calls him, is played by Gael García Bernal, the star of Mexican cinema's greatest export, *Y Tu Mama Tambien,* and its biggest domestic hit, *The Crime of Father Amaro*. (Bernal, now 25, had already played Che in the 2002 Showtime miniseries *Fidel*.)

If not precisely a pussycat, Salles' Che is certainly a sweetheart. He's young and hot (although not as gorgeous as the beardless real Che on the cover of the movie's paperback tie-in). He's shyly avid and a little horny (although not as horny as his buddy Granado, played by Argentine actor Rodrigo de la Serna). James Dean without self-pity, Jack Kerouac sans narcissism, young Che Guevara is a bit of a daredevil, yet he's sensitive enough to have his heart broken; if not yet a communist, he's sufficiently empathetic to give the last of his asthma medicine to a poor, dying old woman.

The movie was shot in sequence and, drawing as much on Granado's *Traveling with Che Guevara: The Making of a Revolutionary* (published in Cuba 17 years before *The Motorcycle Diaries*) as on Che's account, shows its heroes taking their spills and losing their tent, their adventures in Chile's tough towns punctuated by Che's asthma attacks and the motorcycle's many breakdowns. Ultimately the guys junk the bike and continue hitchhiking across the desert—where, in the first of several political epiphanies, they meet a proletarian couple out of *The Grapes of Wrath*. Climbing Machu Picchu inspires a vision of Latin American unity, while Che's climactic stay in a Peruvian leper colony enables him to bond with the wretched of the earth.

The Motorcycle Diaries is an often glorious travelogue to which the filmmakers add a few romantic and picaresque touches—and one political one. As Guevara and Granado refuse to attend Mass, the nuns attempt to deny them food, sparking a demonstration of patient solidarity with the young medics. Dropped, however, is the book's closing evocation of Che's willingness to become "a sacred space within which the bestial howl of the triumphant proletariat can resound with new energy and new hope."

Reviewing the book several years back, Christopher Hitchens drolly de-

clared Che Guevara to be a pioneer exponent of magic realism: "The boy 'Che' drunkenly spouting pan-Americanism to an audience of isolated lepers in a remote jungle [is] a scene that Werner Herzog might hesitate to script, or Gabriel Garcia Marquez to devise." The movie, in which even the nuns are won over to Che's vision, is more an example of soft socialist realism. Che cannot tell a lie—he's honest to a fault. Glib but effective, Salles' *Diaries* grows increasingly heroic in tone, culminating in a scene where the asthmatic hero swims across a river and back to total *Rocky*-like acclaim. It's a tasteful hagiography designed to underscore Che's most celebrated one-liner (at least in the States) that "the true revolutionary is guided by feelings of great love."

Although *The Motorcycle Diaries* doesn't make much of it, Guevara was still a disciple of Gandhi in 1952. Perhaps a subsequent movie—one is in production, starring Benicio Del Toro, and still another is rumored, with Antonio Banderas, who played Che in *Evita*—will detail the year El Che spent in Guatemala, where, thanks to his ringside seat for the 1954 CIA coup that ousted elected President Jacobo Arbenz, he underwent his revolutionary conversion (which included a lifelong anti-Americanism).

After all, the religion of Che is still relatively recent—it's been only 37 years since the prophet was martyred. ■

J. HOBERMAN *is* The Village Voice's *film critic.*

BOOKS

Vexations of the Heartland

WHAT'S THE MATTER WITH KANSAS? HOW CONSERVATIVES WON THE HEART OF AMERICA BY THOMAS FRANK · METROPOLITAN BOOKS · 320 PAGES · $24.00

HOMEGROWN DEMOCRAT: A FEW PLAIN THOUGHTS FROM THE HEART OF AMERICA BY GARRISON KEILLOR · VIKING · 237 PAGES · $19.95

BY RONALD BROWNSTEIN

FEW DEVELOPMENTS HAVE CHANGED American politics more in the past generation than the Republican breakthrough into blue-collar America. White working-class voters were a pillar of the New Deal coalition that allowed Democrats to dominate national politics for the generation after Franklin Delano Roosevelt. But those voters began turning away from Democrats amid the cultural tumult of the 1960s, and the party has never entirely regained their allegiance. From the "silent majority" of Richard Nixon's era to the "Reagan Democrats" who flocked to Ronald Reagan, the angry white men of the 1990s, and the churchgoing legions who backed George W. Bush in 2000, voters of modest means have become central to the Republican political strategy.

This fundamental shift remains a source of endless frustration and puzzlement for liberals. While working-class voters migrated toward the GOP over the past 35 years, Republicans have regularly pursued economic policies, particularly in slashing the top income-tax rates, that offer far greater benefits to the most affluent than to their new constituents. Recently, the Congressional Budget Office concluded that 32 percent of the benefits of Bush's tax cuts fell to just the top 1 percent of earners.

Such numbers leave author Thomas Frank somewhere between stupefied and exasperated in his crisp, impassioned, and often elegant book. He presents the affinity for the GOP among working-class voters as a "derangement" that makes no more sense than if the cattle somehow conspired to help sharpen the knives at the slaughterhouse. "People getting their fundamental interests wrong is what American political life is all about," Frank writes on his very first page. "This species of derangement is the bedrock of our civic order; it is the foundation on which all else rests."

Frank takes his title from an 1896 essay in which Kansas journalist William Allen White, editor of *The Emporia Gazette*, eviscerated the left-wing populist followers of William Jennings Bryan. Frank, also a native Kansan, similarly wants to explain and puncture the conservative populism that has powered the GOP advance into working-class America since the 1960s.

Frank is a talented stylist and engaging storyteller, and his stew of memoir, journalism, and essay produces many fresh insights. But ultimately his explanation for the success of populism on the right is too narrow, and his analysis of the Democratic response, especially under Bill Clinton in the 1990s, too simplistic. The paradoxical result is a book that, for all its virtues, is too sanguine about the electoral challenge Democrats face and too pessimistic about their ability to overcome it.

Frank tells his story largely through the experience of Kansas, where a moderate Republican establishment that gave the nation Dwight Eisenhower, Bob Dole, and Nancy Kassebaum has been overwhelmed by the rise of blue-collar conservative activists driven almost entirely by such social issues as opposition to abortion. As Frank explores his own conversion from right to left, recounts the dizzying internecine warfare between moderates and conservatives in the Kansas GOP, and visits an assortment of true believers, the results are entertaining and earnest. Frank sometimes lets his disdain for the right cloud his understanding; he seems incapable, for example, of imagining that social issues might trump material concerns for some middle-income voters. But he is often funny and rarely condescending.

Yet because Kansas has been reliably Republican roughly forever, Frank's story is mostly useful in explaining the generational change in the GOP that has marginalized moderates and elevated conservatives—a change neatly encapsulated by the distance between George

Bush Senior's in-box presidency and his son's crusading conservatism.

Frank has larger aims. Expanding from the Kansas experience, he presents the GOP renaissance since the 1960s as the fruit of a simple but brilliantly executed sleight of hand: an agenda that distracts the masses with cultural grievances while showering economic benefits on the very elite the masses are directed to despise. "Cultural anger is marshaled to achieve economic ends," he writes, summarizing his 320 pages with admirable concision.

The great success of conservative populism, he concludes, has been to change the way millions of average Americans think about liberalism. In Roosevelt's era, Americans saw liberalism mostly as a means of protecting the economic interests of average families. Now, Frank argues, conservatives have effectively redefined liberalism as an agenda with principal goals that are cultural rather than economic. "Whatever the target," he writes, "the conservative social critique always boils down to the same simple message, liberalism ... is an affectation of the loathsome rich, as bizarre as their taste for Corgi dogs and extra-virgin olive oil." I'm not sure what a Corgi dog is, but I'm guessing you wouldn't find many of them yelping out the window of a pickup truck.

Socially conservative and religiously devout voters have indeed become the bedrock of the GOP coalition: In 2000, white voters who attended church more than once a week voted for Bush over Al Gore by about 4 to 1. But Frank errs by emphasizing cultural issues to the virtual exclusion of all others in explaining the Democrats' retreat among the white working class. That narrow focus may be understandable given his book's grounding in Kansas, where social issues—from abortion to the teaching of evolution—have generated most of the past decade's political turmoil. Yet by slighting other factors that have fueled the GOP's breakthroughs, he minimizes the breadth of the challenge Democrats face with working families.

Frank touches on the role of racially tinged issues, from crime to welfare, in dissolving the Democrats' ties to working-class voters. Those issues provided a strong tailwind for the GOP in working- and middle-class white communities from the late 1960s through the early 1990s, but Frank is right that liberals are too quick to blame their setbacks solely on coded appeals to racism. And however powerful those issues were earlier, they lost much of their sting as Clinton's policies both contributed to a decline in crime and welfare dependency and left the Democrats holding much more centrist ground on both fronts.

Clinton's victories showed Democrats could expand their electoral appeal up the income ladder while delivering benefits for families with lower incomes.

But Frank says almost nothing about the role of anti-government populism and issues of national security and strength in the realignment of working-class America. Yet both rival cultural issues as assets for the GOP. Republicans have won blue-collar support for tax cuts not only by diverting attention to cultural issues but also because millions of Americans have concluded that government either wastes their taxes or lavishes their hard-earned money on the undeserving poor. Frank's silence on the GOP's effective use of security issues over the past generation is even odder, especially in the aftermath of the September 11 terrorist attacks. From Richard Nixon through George W. Bush, Republicans have benefited from a reputation for defending the nation more forcefully.

And though the war in Iraq has strained confidence in Bush's management of national security, polls show his determination to emphasize military force in combating terrorism generally finds more support on the assembly line than in the office parks. In a survey last year, researchers at the Pew Research Center for the People and the Press asked Americans whether they agreed with the statement, "The best way to ensure peace is through military strength." Lower-income voters and those with only high-school educations were much more likely to agree than the affluent and those with college degrees.

The wrong diagnosis of the Democratic dilemma leads Frank to the wrong solution. He wants Democrats to abandon their efforts to court upper-income voters who share the party's views on social issues and instead to amplify the volume on economic populism. The Democrats' recent experience challenges that prescription on both counts. In 2000, Gore thumped the populist tub as loudly as any liberal critic could demand. Yet his promise to represent "the people" against "the powerful" wasn't enough to stop Bush from winning most white working-class votes. Conversely, Clinton's two victories demonstrated that it was possible for Democrats to expand their electoral appeal up the income ladder while delivering tangible benefits for lower- and middle-income families.

Like many on the left, Frank casually assumes that Clinton (and the Democratic Leadership Council that hatched many of his ideas) abandoned the party's historic commitment to the less fortunate. Yet under Clinton, core Democratic constituencies gained more ground than at any time since the boom years of the 1960s. During Clinton's two terms, the number of Americans in poverty fell by 8.1 million, compared with just 77,000 during the eight years of Reagan. From 1993 through 2000, the median income grew faster for African Americans and Hispanics than it did for whites (who enjoyed a healthy increase of their own). Income for families on every rung of the economic ladder grew faster under Clinton than it did under Reagan, the Congressional Budget Office recently calculated; for those smack in the center of the income distribution, the growth was nearly twice as fast.

The very rich did very well under Clinton, with incomes also rising faster than under Reagan. But while the average federal income-tax burden on the top fifth of families fell sharply under

Reagan, income taxes rose as a share of income for the top 20 percent during Clinton's two terms. That helped generate the funds Clinton used to provide health care for children of the working poor, increase the federal investment in education, and expand the Earned Income Tax Credit.

The kicker is that while Clinton delivered these tangible benefits to his party's traditional constituencies and demanded more from the affluent in taxes, he greatly expanded the party's electoral appeal among the comfortable voters Frank believes are fool's gold for Democrats. In the three presidential elections of the 1980s, Democrats lost voters earning $50,000 a year or more by at least 25 percentage points; Clinton cut that deficit to 5 points or less in both his elections—even while simultaneously improving the party's performance among voters earning between $15,000 and $30,000.

Clinton succeeded at both ends because he advanced an activist agenda that provided benefits to average families while confronting *all* of the arguments conservatives use against Democrats. He moved the party away from its post-Vietnam reluctance to use force, defanged anti-government populism by embracing a balanced budget, and showed respect for traditionalist values in his policies (particularly measures such as welfare reform that linked responsibility with opportunity) if not his personal behavior. Largely because of that personal behavior, Clinton didn't leave behind the stable majority he hoped to; but he proved, contrary to Frank, that Democrats don't have to choose between Wal-Mart and Starbucks.

Frank is an essayist, not a political strategist, so it would be wrong to hold these lapses too much against him. His book is a smart and trenchant contribution to the liberal argument, and a fun read as well.

Much the same can be said about *Homegrown Democrat* from Garrison Keillor, another literary midwestern populist. It's a memoir and a meditation, not a manifesto. Like Frank, Keillor sometimes strays into hyperbole (does Keillor really believe the GOP's leadership is "borderline psychopath"?). But Keillor is frequently beguiling and sometimes moving as he explains his unshakeable belief that the fundamental divide in politics is between those who believe we are obligated to care for our neighbor and those who don't. To Keillor, liberalism is nothing more than the organized expression of the impulse that causes strangers to volunteer when a neighbor is threatened by flood. "Liberalism is the politics of kindness," he insists.

Keillor, like Frank, seems mystified that anyone who folds his own laundry would vote Republican. But the days of a political alignment defined solely, or even predominantly, by class are gone. Many Americans, on both sides of the income divide, don't consider it a "derangement" to express their cultural values at least as much as their economic interests in their vote. Overall, Frank and Keillor have written books of grace, empathy, and insight. But in assuming that Democrats can only win by resurrecting the politics of Franklin Roosevelt and Hubert Humphrey, they are steering through the rearview mirror. ■

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BOOKS

Top Gun

WAR AND THE AMERICAN PRESIDENCY BY ARTHUR M. SCHLESINGER JR. · NORTON · 224 PAGES · $23.95

AMERICA RIGHT OR WRONG: AN ANATOMY OF AMERICAN NATIONALISM BY ANATOL LIEVEN · OXFORD UNIVERSITY PRESS · 304 PAGES · $30.00

BY LAURA SECOR

IT HAS BECOME A CLICHÉ TO HURL back at President George W. Bush his statement as a candidate in 2000 that the United States would be resented abroad for arrogance but welcomed for humility. Four years later, with America deeply resented abroad and bitterly divided at home as a result of the policies Bush has followed, little, it would seem, remains to be said on this score. But two new books criticizing the hubris and messianism of Bush's foreign policy are both well worth reading—one for its eloquence, the other for its rigor, originality, and fresh perspective.

Arthur M. Schlesinger Jr., the eminent American political historian and a onetime aide to President John F. Kennedy, has issued a slim new volume with a stentorian title. *War and the American Presidency* consists of seven interlocking essays that place the Bush doctrine and its consequences in historical perspective. There is little that is truly new here, but Schlesinger writes with dignity and authority. Among the essays is an instructive history of America's robust tradition of patriotic wartime dissent and of the sometimes hysterical measures taken to suppress it, including the Alien and Sedition Acts of 1798 and the violations of civil liberties during World War I. After each episode, "we hated ourselves in the morning," Schlesinger writes. And so he concludes, "Looking back a decade from now, I doubt that most Americans will take much pride in the fate of the 660 Guantanamo Bay 'detainees' denied specification of charges, access to counsel, contact with families, and the right to a judicial hearing."

To these and other questions, Schlesinger brings the sobriety of one who has not only studied history but observed it in the making. Nonetheless, he indulges few illusions about the predictive power of the past. History furnishes metaphors, he cautions, but those who seek to generalize from historical experience must beware "the bewitchment of analogy." "Munich" has become a byword for appeasement, but those who invoke it in

every instance of confrontation with tyrants abroad risk obscuring the situational nuances that might yield more effective and less costly solutions to the crises at hand. While history can offer perspective, it can also produce stereotypes "wrenched illegitimately out of the past and imposed mechanically on the future." History, concludes Schlesinger, can answer questions at long range, which is of interest to historians, but very rarely at short range, as policy-makers require.

Schlesinger himself has a foot in both worlds. He has much to say about the direction of foreign policy under Bush, and most of it could fit under the heading of frank disapproval. Of particular concern to Schlesinger is Bush's decision to enshrine not preemptive war, for which there is a place under international law and which presumes an imminent threat, but preventive war, which requires only a speculative, future threat, as a foreign-policy doctrine for the post–September 11 era. "Mr. Bush replaced a policy aimed at peace through the prevention of war by a policy aimed at peace through preventive war," writes Schlesinger. That policy—combined with the neoconservative vision of a permanent American supremacy enabling the United States "to promote democracy, free markets, private enterprise, and godliness, and thereby control the future"—has produced a corrosive arrogance and militarism.

Schlesinger recalls his earlier work on the "imperial presidency," or the expansion of presidential powers during wartime, and notes that in the past, emergency prerogatives have expired with the resolution of war. The implication is that the current president has seized such prerogatives without the constraint of a military engagement with a foreseeable end. What's more, he writes, though it would unleash global chaos to endorse a universal right to wage preventive war, it is also difficult to justify reserving that right to the United States alone. In doing so, we "make our nation the world's judge, jury, and executioner. However virtuous some Americans may feel in assigning this triple role to an American president, less powerful nations are likely to hate us for it."

NATIONALISM UNBOUND

It is precisely this notion of unique American virtue that preoccupies Anatol Lieven, a British journalist and senior associate at the Carnegie Endowment for International Peace. Fiercely smart and lucidly written, his *America Right or Wrong* is part trenchant study of American national feeling, part critique of Bush's foreign policy and of the deepest cultural assumptions upon which it is based. The United States, Lieven reminds us, bears no special immunity to the power and peril of nationalism, that crude force that has shaped the last two centuries' global history more consistently than any other.

Scholars of nationalism have long distinguished between ethnic nationalism, based on blood and soil, and civic nationalism, based on contracts, citizenship, and consent. Lieven recognizes American nationalism as an often contradictory amalgam of the two. One strand, the "American creed," draws upon "the set of great democratic, legal, and individualist beliefs and principles on which the American state and constitution are founded." To be sure, this panoply of essentially liberal ideals is the shared heritage of the West; but Americans, writes Lieven, imbue it with a particular universalizing zeal because it also forms the basis of the civic nationalism that glues together a vast and disparate nation. The other strand, by contrast, which Lieven dubs Jacksonian nationalism, consists of "a diffuse mass of identities and impulses, including nativist sentiments on the part of America's original white population, the particular culture of the white South, and the beliefs and agendas of ethnic lobbies."

Our triumphalist, evangelizing civic nationalism seeks to remake the world in its image, which it presumes to be the very essence of progress. Our "don't tread on me" nativist nationalism assumes the defensive, often racist posture characteristic of embittered and defeated nations. While the civic tradition tends to dominate American public life, the Jacksonian strain rises to the surface at times of crisis. The civic strain, writes Lieven, is radically forward-looking; the Jacksonian strain, like

many European nationalisms before it, looks persistently backward, to a vanished age of presumed purity.

The United States is able to encompass these profoundly contradictory impulses because it is at once progressive and traditionalist, shaped by a radically secular capitalism and a uniquely pervasive religiosity. The piece of America that is socially, politically, and morally conservative—largely the white, Protestant South—has assumed the chronically defensive posture of a defeated minority. To liberals frustrated with a political establishment dominated by conservatives, this mentality is hard to understand. But Lieven observes that American society will never revert to the Eisenhower-era values many conservatives idealize: Capitalism inexorably modernizes everything from industry to sexual mores, and as hard as religious conservatives fight, they are right to perceive theirs as a battle already lost. Ironically, notes Lieven, this conservative anguish has been effectively exploited by a Republican Party that also seeks to unleash fully the very free-market forces that most threaten traditional community values. Such is the demagogic power of nationalism.

Although Lieven devotes two substantial chapters to the roots of embittered Jacksonian nationalism—the frontier of Andrew Jackson's day, the tortured history of American race relations and the defeat of the confederacy in the Civil War, the unique provenance of fundamentalist Protestantism—this book is, at its heart, a critique of an increasingly nationalist American foreign policy. Lieven is troubled by the projection of either form of American nationalism onto a world presumed passive. Americans, Lieven contends, fail to study other nations in depth but believe that their creed dictates what is right for others. Those who disagree or seek to restrain American ambitions, whether friends or foes, are treated to a geyser of bilious ridicule. According to many neoconservative thinkers, the very extension of American power implies the triumph of good over bad political systems and ideals. Echoing Schlesinger, Lieven writes, "To assert the unique morality of your country's political culture is already to adopt a position which the rest of the world will find very difficult to accept, and will be strongly tempted to challenge by reference to the darker episodes of your past—thereby setting off ugly national exchanges. To assert this and then derive from it, like [*Weekly Standard* Editors] William Kristol and Robert Kagan, the belief that America's 'moral goals and its fundamental national interests are almost always in harmony' is to come rather close to saying 'my country is always right.'"

Lieven is right to discern in such thinking the tropes of nationalisms past, and his unwillingness to view American nationalism as exceptional is a breath of fresh air in the current political climate. Indeed, Lieven compares the intensity of American national feeling to that of Europe prior to the outbreak of World War I. In his final chapter, an impassioned and persuasive, if somewhat tangential, critique of American policy vis-à-vis Israel, Lieven compares the American commitment to Israeli national interests to Russia's fealty to Serbia before the First World War. In both cases, a small, revisionist, and potentially radical country in an unstable region, when offered a nearly unconditional guarantee by a superpower, finds itself emboldened to enact its most destabilizing and maximalist agenda. And in both instances, the allied superpower has found itself increasingly embroiled in explosive regional politics, ultimately against its own national interests. Lieven advocates not that the United States abandon Israel but that it cease to view its commitment as unconditional. Rather, the United States should use its leverage to exert serious pressure on Ariel Sharon's government to withdraw to within Israel's 1967 borders. This course of action, writes Lieven, would require the U.S. government to exercise the same "political and moral courage" that it requests when it urges Muslims to stand up to extremists in their midst.

Lieven also categorically disapproves of the United States putting pressure on its allies and trading partners (leave aside, for the moment, its enemies) to adopt democratic reforms or show greater respect for human rights. These are some of his book's muddiest passages. In pressing China to improve its human-rights record, Lieven laments, American policy-makers fail to appreciate the Chinese government's economic accomplishments. But do economic accomplishments render human-rights abuses irrelevant, and can they only be recognized at the expense of all other criticism? Lieven's larger point is that those who suggest that the United States advocate democracy or human rights abroad often do so presuming that the American creed is the world's, and that the United States has a quasi-religious duty to spread the good news. Suppose that in doing so, the United States tramples on the particularities, cultural or situational, of another country that is pursuing its own path. By virtue of what virtue, Lieven asks, does the United States arrogate to itself the power to designate some countries "enemies of freedom"?

The United States bears little immunity to the power and perils of nationalism, the force that has shaped the last two centuries more than any other.

Though such questions are well-taken, Lieven doesn't explore the alternatives, which are often even more unappealing. Would the United States do better to cast its weight behind human-rights-abusing or autocratic allies? Doesn't it exert influence in either case, whether it presses for reform or simply endorses and further empowers a repressive regime as it is? For a country the size and strength of the United States, there is no value-neutral way to engage with the world. Those who seek one often find themselves drawn toward isolationism or, like Lieven, toward a realism that accepts brutal governments as necessary for some peo-

ples. But, as a theory of international relations, realism—with its focus on threats and resources over rights and freedoms—promotes a nationalist agenda of another kind, as Lieven himself observes.

Lieven does not even acknowledge such problems as morally thorny ones. Rather, his blanket hostility toward any kind of explicitly value-driven foreign policy leads him to see no difference between even moderately hawkish liberals and fire-breathing neoconservatives. He quotes from an essay by Michael Tomasky [Full disclosure: The reviewer is a contributor to the anthology in which that essay appears, and Tomasky is the executive editor of this magazine.] in which Tomasky calls for the United States to press Turkey and Saudi Arabia to comply with international human-rights norms. Lieven compares Tomasky to Richard Perle, mistakenly presuming that Tomasky endorsed the war with Iraq and suggested pressing Turkey and Saudi Arabia for reform in order to punish the Turks for refusing to cooperate with the war plans and the Saudis for their hostility toward Israel.

Still, Lieven's book is original, thought-provoking, and urgent. Nationalism can be bellicose, self-righteous, and conflict-prone. It treads on the views and interests of others and, at its extreme, justifies brutality. American civic nationalism had its comeuppance at Abu Ghraib. Schlesinger writes that the very "atmospherics of the Bush presidency" led us there. Lieven sees in that atmosphere the cold front of Jacksonianism hurtling toward the warm front of the American civic creed. It's a storm that may pass with the passing of the Bush presidency. But Schlesinger, a believer in the American creed if there ever was, sees another force at work.

"As a world empire," he writes, "the United States is undone by its own domestic politics and its own humane, pluralistic, and tolerant ideals. The premises of our national existence undermine our imperial aspirations. So the imperial presidency redux is likely to continue messing things up, as we are doing so successfully in Iraq, the needless war. Then democracy's singular virtue—its capacity for self-correction—will one day swing into action." ■

BOOKS

Who Killed Camp David?

THE MISSING PEACE: THE INSIDE STORY OF THE FIGHT FOR MIDDLE EAST PEACE BY DENNIS ROSS • FARRAR, STRAUS AND GIROUX • 864 PAGES • $35.00

BY SASHA POLAKOW-SURANSKY

THE HISTORIC CAMP DAVID TALKS during the summer of 2000 failed, so the conventional wisdom goes, because Yasir Arafat rejected an extraordinarily generous offer that Ehud Barak put on the table. This view has achieved the status of unassailable truth in the United States and Israel by virtue of its constant repetition by pundits and politicians alike. It is not an explanation for the talks' failure that Dennis Ross, the chief Middle East peace negotiator from 1988 to 2001, disputes. But his epic 864-page play-by-play account of the peace process gives far more nuance to the story and suggests that the Israelis also bear some responsibility for the outcome.

Ross clearly supports the special relationship of the United States with Israel, a view that places him squarely in the pro-Israel camp. Yet, except for the late Yitzhak Rabin, Israeli leaders do not emerge unscathed from Ross' account. He depicts Yitzhak Shamir as the bane of the first Bush administration and chronicles Benjamin Netanyahu's tenure with barely disguised contempt. Although the entire Clinton team, not to mention the Palestinians, had high hopes for peace when Barak came into office, Ross does not hesitate to describe him as somewhat socially inept, egotistical, and tactically clumsy.

One of the most surprising elements in Ross' memoir concerns failed negotiations between Syria and Israel. Until now, only the Arab media have accepted the narrative that Syria offered serious compromises in 2000 and Israel walked away. But as Ross demonstrates, Barak balked when the Syrians showed they were ready for a deal, and in so doing blew a major opportunity for peace with Syria at high-level talks that he himself had pushed for. When the moment of reckoning came, at the January 2000 summit in Shepherdstown, West Virginia, Barak backtracked from earlier commitments, infuriating Syrian Foreign Minister Farouk Shara. According to Ross, it was a "fundamental mistake," and he prophetically warned Barak that "you may not have another round." Indeed, Shara was lambasted in Syria, and Syrian President Hafez al-Assad took Shepherdstown as a slap in the face, concluding that Barak was not a serious negotiating partner. When Bill Clinton met al-Assad in Geneva, Switzerland, several months later (again at Barak's request), the Syrian leader was dismissive. Preoccupied with his waning health and succession, al-Assad no longer showed any interest in peace with Israel.

Though his chronicle of more than a decade of Israeli-Palestinian peace negotiations finds many faults on both sides, Ross is ultimately unequivocal in attributing blame for the final failure of Clinton's peacemaking effort. "Only one leader," he writes, "was unable or unwilling to confront history and mythology: Yasir Arafat." Whether or not one accepts this conclusion depends on some intricate points of interpretation.

The most credible view that Arafat was not solely responsible for the failure of negotiations comes from an account that appeared in *The New York Review of Books* in August 2001 by Robert Malley and Hussein Agha, who were both present at Camp David. Malley was Clinton's special assistant on Arab-Israeli affairs; Agha, an Oxford academic, served as an adviser to the Palestinian delegation. Malley appears frequently throughout Ross' book and, on occasion, was the only note-taker present in the room when Clinton met with Israeli and Palestinian leaders.

According to Malley and Agha, Arafat arrived at Camp David afraid that the Israelis and Americans would gang up on him and force a deal, given Clinton's impending departure and Barak's tenuous grip on power. Moreover, in the effort to achieve a final-status, end-of-conflict deal, Barak had discarded many interim steps that Arafat regarded as critical. Most notable was Barak's failure to carry out an agreement to transfer control of three West Bank villages near Jerusalem. On June 15, in their final meeting before Camp David, Arafat complained to Clinton that Barak had reneged on the villages and was holding all the cards. As Malley and Agha write, "Unfulfilled interim obligations did more than cast doubt on Israel's intent to deliver; in Arafat's eyes, they directly affected the balance of power that was to prevail once permanent status negotiations commenced." Malley and Agha go on to argue that Arafat-bashers who believe he favored incrementalism over a historic deal misunderstand the situation. "Like Barak," they write, "the Palestinian leader felt that permanent status negotiations were long overdue"—but "unlike Barak, [Arafat] did not think this justified doing away with the interim obligations," which Arafat insisted were "inextricably linked."

On Day 7 of the Camp David talks, the Israelis cloistered themselves for 13 hours, and, with no word from them, Clinton became angry. As he was about to break up the meeting, word came that Barak had choked on a peanut and required the Heimlich maneuver. When the members of Barak's team arrived, they backtracked on key points while still refusing to transfer the three villages. In an episode related by both Ross and Malley, Clinton was irate, yelling at Barak, "I can't go see Arafat with a retrenchment .... There is no way I can. This is not real. This is not serious." Reviving his anger at Barak's gameplaying over Syria, Clinton continued: "I went to Shepherdstown and was told nothing by you for four days. I went to Geneva and felt like a wooden Indian doing your bidding .... I will not let it happen here. I will simply not do it."

But at this point the narratives diverge. Ross characterizes Barak's next move as a courageous, serious offer giving Palestinians 91 percent of the West Bank, custodianship of the Temple Mount, half of the old city, and much of East Jerusalem. Malley and Agha contend that the Palestinians never saw it as an offer at all, as it never appeared in writing and they were hesitant to trust Barak on permanent-status promises given his disregard of interim steps. Nevertheless, the image that emerged from Camp David in the Western press, buoyed by Clinton's own statements, was clear: Barak had taken a huge risk, and Arafat had walked away.

Though pundits have depicted Camp David as the make-or-break moment for an agreement, the most serious negotiations actually took place in the ensuing months. Barak invited Arafat to his home for dinner days before Ariel Sharon's notorious visit to the Temple Mount and the subsequent outbreak of the second intifada. (Interestingly, Ross asked Israel's internal-security minister to forbid Sharon's visit on security grounds. The minister said "no," citing intelligence reports showing no threat of violence.) Even after violence erupted, negotiations continued with some creative ideas about the controversial Temple Mount, including, at one point, granting sovereignty to God.

As the year came to an end, time was running out, and Clinton made a final proposal on December 23. It was far more favorable to the Palestinians than the Barak "offer" at Camp David. Now they would have approximately 95 percent of the West Bank and a 2-percent land swap, sovereignty over the Temple Mount and "all that is Arab" in Jerusalem, and refugees' right of return to the new state of Palestine.

It is Arafat's rejection of these ideas that led Ross to conclude that Arafat bears the blame for the failure of the talks and the subsequent descent into mayhem. Malley and Agha maintain that Arafat feared these were only "parameters" and not a deal. And with less than a month left with Clinton in power and only six weeks with Barak, the Palestinians feared that they would obtain nothing tangible. Ross warned Ahmed Qureia (currently the Palestinian prime minister) that George W. Bush would disengage from the peace pro-

cess and that the 97 percent on offer would shrink to 45 percent under Sharon's leadership.

He was right. It will be left to the historians to decide from these and future eyewitness accounts whether the deal failed, as Malley and Agha put it, "less by design than by mistake, more through miscalculation than through mischief"—or whether, as Ross contends, Arafat was simply unable to transform himself, à la Nelson Mandela, from a revolutionary into a peacemaker. ■

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BOOKS

Can't Swallow It Anymore

ON THE TAKE: HOW MEDICINE'S COMPLICITY WITH BIG BUSINESS CAN ENDANGER YOUR HEALTH BY JEROME P. KASSIRER • OXFORD UNIVERSITY PRESS • 288 PAGES • $28.00

THE $800 MILLION PILL: THE TRUTH BEHIND THE COST OF NEW DRUGS
BY MERRILL GOOZNER • UNIVERSITY OF CALIFORNIA PRESS • 297 PAGES • $24.95

POWERFUL MEDICINES: THE BENEFITS, RISKS, AND COSTS OF PRESCRIPTION DRUGS
BY JERRY AVORN • ALFRED A. KNOPF • 448 PAGES • $27.50

BY CARL ELLIOTT

COULD WE FINALLY BE SEEING A BACKlash against the pharmaceutical industry? After all those headlines about Medicaid fraud, research abuse, data suppression, class-action lawsuits, recalled drugs, conflict-of-interest scandals, corporate whistleblowers, ghostwritten research papers, and kickbacks to physicians—not to mention the video clips of elderly New Englanders hauling their walkers onto chartered buses to fill their monthly prescriptions in Canada—is the American public finally getting wise to Big Pharma? According to a Harris poll reported in the *British Medical Journal*, public confidence in drug companies has plunged faster than for any other industry, putting it on a par with the oil business and even Big Tobacco. The proportion of Americans who believe that the pharmaceutical industry is "generally honest and trustworthy" now stands at a mere 13 percent. And if the raft of books on drugmakers published this year is any indication, the approval rating among academic authors is even lower.

In fact, a reader of Jerome Kassirer's alarming new book, *On the Take*, might be forgiven for concluding that the Americans who say that the pharmaceutical industry is honest must be getting kickbacks themselves. Kassirer, a physician and former editor in chief of *The New England Journal of Medicine*, has taken on the daunting task of documenting the varied and ingenious ways in which his fellow physicians have managed to accept money and gifts from pharmaceutical companies without calling the practice "bribery."

Some of his story is depressingly familiar—fancy dinners, dressed-up "consulting fees," expense-paid conferences at Caribbean resorts and Alpine ski lodges. But there is plenty of novelty here, too. We hear of corporate-funded journal supplements, in which marketing propaganda comes disguised as peer-reviewed scientific literature; of expert panels where all the experts are on the industry payroll; of journal articles ghostwritten by industry-funded medical writers and signed by industry-funded academics; and of the scandal of what is politely called "continuing medical education," 60 percent of which is now funded by the pharmaceutical industry. Big Pharma spends about $21 billion a year on marketing; 88 percent of that staggering sum is directed at doctors. According to Kassirer's calculations, that amounts to more than $30,000 per physician.

One virtue of this fine book, at least as a muckraking exhibit, is that its author, a physician of the old school, has been around long enough to see a lot of unraked muck. Although he does not tell the story here, Kassirer was reportedly ousted as editor of *The New England Journal of Medicine* because of his unwillingness to allow the *Journal*'s name to be used as a marketing device. He was also one of the enlightened figures who instituted the *Journal*'s policy (now rescinded) of refusing to publish editorials and review articles by authors with a financial interest in the topics they were addressing. As Kassirer points out, this editorial policy, while rare among medical journals, is standard at other publications. Kassirer quotes from a policy developed by the wine writers of *The Wall Street Journal* (who do not accept free wine, free trips, or free meals), from the editorial policy of *The New York Times* (which prohibits staff members from having any financial interest in the topics or industries they cover), even from that trusted friend of the global backpacker, the publishers of the *Lonely Planet* travel books (whose policy is not merely to refuse gifts and payment from potential beneficiaries of their recommendations but also to refuse advertising). Kassirer asks, quite reasonably, why should doctors set their own ethical bar so much lower?

If nothing else, you have to admire Kassirer's willingness to call a spade a spade—and, in at least one case, to call a doctor a "marketing whore." The problem with the book is that after reading about so many of these marketing scams, your eyes start to glaze over. It is hard to sustain moral outrage when corruption seems so pervasive. After awhile you start to marvel at the sheer ingenuity of the industry in figuring out so many ways to buy off doctors while disguising it as education, research, or some other benevolent activity.

If Kassirer is a reluctant muckraker, Merrill Goozner is an enthusiastic debunker. The title of his new book, *The $800 Million Pill*, comes from a much-hyped study from the industry-funded Tufts University Center for the Study of Drug Development, which in 2001 estimated the average cost of developing a new drug at $802 million. Big Pharma now routinely invokes that figure ("with the force of an incantation," as

Goozner puts it) to justify its enormous profits. Americans may pay dearly for their medicine, the industry argues, but that's the cost of innovation.

Goozner does not buy it. The Tufts economists claimed that the cost of drug development has risen so dramatically because of the rapidly growing cost of testing drugs in human clinical trials (as opposed to earlier stages of development). They also argued that development costs have risen because the pharmaceutical industry has turned its attention to treatments for chronic and degenerative diseases. But if this is true, asks Goozner, why haven't development costs risen dramatically in the public sector, which has managed to develop new drugs for AIDS and cancer at a fraction of the cost of industry trials? At least one answer (among many) is that the drug industry pours vast sums of money into human trials whose sole purpose is marketing. According to one credible estimate, the drug industry spent $1.5 billion in 2000 testing medicines that had already been approved by the Food and Drug Administration. Some of these studies are conducted merely to give drug representatives and advertisers ammunition to market the drugs. Others, known as "seeding trials," are conducted mainly to make community doctors familiar with new drugs. (If you pay doctors to enroll their patients in a clinical study of a new drug, they will be more likely to prescribe that drug in the future.)

Goozner points out that the watchdog group Public Citizen used different accounting methods and came up with a figure of only $71 million to develop a new drug. The Global Alliance for TB Drug Development, despite using methods similar to those of the Tufts researchers, estimated the cost of developing new tuberculosis treatments at $115 million to $240 million.

Goozner, now a staff member at the Center for Science in the Public Interest (and a *Prospect* contributing editor), was formerly chief economics correspondent at *The Chicago Tribune*, and it shows. *The $800 Million Pill* is an authoritative, elegantly written, thoroughly researched book. Despite its title, the bulk of the book is not about the Tufts studies. Goozner's real aim is to draw back the curtain on the drug and biotech industries and give a more complete account of how drugs are developed. He begins with the story of Eugene Goldwasser, the University of Chicago biochemist who isolated erythropoietin, an enzyme produced in the kidney that signals bone marrow to make red blood cells. Goldwasser shared his research with the company that later became Amgen. When Goldwasser retired in 2002 after a 47-year career, he did it without riches or glory. Yet Amgen transformed Epogen, the recombinant-engineered version of the enzyme Goldwasser isolated, into the most profitable biotech drug in the world. At a time when biotech entrepreneurs get rock-star treatment from the press, stories like this do not get told very often. Yet again and again, Goozner shows how private-sector developments, touted as pure products of the market, would have been impossible without the work of publicly funded scientists.

Powerful Medicines is a harder book to characterize. Jerry Avorn is neither a muckraker nor a debunker. He is equal parts teacher and reformer. An internist and pharmacoepidemiologist at Harvard, Avorn has set about explaining how drugs are developed, tested, priced, approved, and prescribed—and at each step of the way, how things can go badly wrong. We hear about the FDA, about drug-industry promotion, about recalled prescription drugs, and also about patients themselves. Much of the book is explanatory—say, what a randomized clinical trial is and why it is such a powerful tool. In some hands this approach could become tedious, but Avorn also happens to be very funny. *Powerful Medicines* is not just a highly successful book; it is an ambitious one. Unlike many writers, Avorn proposes solid ideas about how to build a more rational system of drug evaluation. He argues, for example, that we desperately need a new kind of "information-transfer organization" aimed at providing doctors with the unbiased information they need to prescribe drugs in a cost-effective way. This may sound obvious, but as Avorn powerfully demonstrates, we are nowhere close to it now.

Some seasoned readers may know Avorn as the pioneering force behind the concept of "academic detailing" (sometimes known as "counter-detailing"), in which academic physicians deploy the marketing techniques of the drug industry in order to promote scientific, evidence-based prescribing. (Drug representatives, known in the old days as "detail men," are the salespeople that the industry employs to make sales pitches to doctors.) Academic detailing is a gimmick, and it will never come close to matching the actual detailing that the drug industry employs, but it rests on a powerful idea that runs through Avorn's book: Why shouldn't drug prescription be based on scientific and economic evidence, rather than our current irrational mix of advertising, public relations, and bureaucracy?

There are faint signs of improvement on the horizon. Congress has taken an interest in the conflict-of-interest scandal at the National Institutes of Health. The American press (many years after the British) has started to give serious coverage to a possible association between antidepressants and suicide. Medical editors are calling for a clinical-trial registry that would make it harder for the drug industry to hide unfavorable trial results. Many people are calling for the repeal of the Prescription Drug User Fee Act, which has made the FDA financially dependent on the very industry it is supposed to be regulating. Marcia Angell, another former editor of *The New England Journal of Medicine*, argues in her new book, *The Truth About the Drug Companies*, that the FDA should require pharmaceutical companies to test all new drugs not merely against placebos but against currently available treatments—a measure that would not only be far more useful to clinicians but would discourage the development of me-too drugs. Angell writes that the government should set up an institute to oversee the design and analysis of clinical trials, in order to prevent Big Pharma from manipulating research results to suit its own marketing needs. Time will tell whether any of these initiatives will take hold. ■

CARL ELLIOTT *is the author of* Better Than Well: American Medicine Meets the American Dream *and co-editor with Tod Chambers of* Prozac as a Way of Life.

Where Are the *Rational* Greedy Bastards?

BY ROBERT B. REICH

Why is big business so enthusiastic about another Bush term? Yes, corporations have gotten a few fat tax breaks and regulatory rollbacks, and more face time with the president than do White House security guards. But on the issues that count, the current administration and its allies are undermining the foundations of American business.

Consider the deficit. The Congressional Budget Office now says it will total more than $420 billion this year, with no end in sight. George W. Bush promises to halve it over the next four years. Wall Street knows that's rubbish, which is partly why the stock market is stuck in neutral. There's just no human way he can cut the deficit and also deliver on his promises to make his tax cuts permanent and adjust the alternative minimum tax, while at the same time chasing terrorists, paying for the new Medicare drug benefit, maintaining agribusiness' subsidies, and financing all the other things hardwired into the Bush budgets. Privately, CEOs and Wall Street bankers fret about the mounting red ink. They remember what happened to the economy under previous Republicans, and they know supply-side economics is bunk masquerading as a free lunch.

Or take Bush's go-it-alone nationalism. Most big businesses are global. They depend on worldwide networks of consumers, suppliers, and investors, so they need international goodwill. But under Bush, the United States has become the global village's town bully. Bush has thumbed his nose at long-standing allies and turned his back on every international organization and treaty that stands in his way. The CEO of an American-based clothing giant told me that his firm is "playing down" its U.S. parentage "in light of public opinion" where it does business abroad. CEOs and Wall Streeters also see the steady decline of support for free trade around the world, another casualty of the current unilateralism. And they see the slide in foreign investment. Foreigners are investing less in America because global investors are worried about the direction this nation is heading under W.

And then there are the right-wing evangelicals. Today their fanaticism is directed at the entertainment industry, makers of contraceptives, and stem-cell researchers. But will they stop there? Their next targets could be the advertising industry, makers of cosmetics, perfume, and alluring clothes. After all, American business packages sex in many forms. And not just sex: A large portion of our gross national product is based on appeals to what might be called the baser instincts. American business is the giant engine of modernism. It embodies innovation and experimentation. It celebrates appetite and pleasure. Right-wing fundamentalism in America could easily take the form of a backlash against pleasure-filling capitalism, as has fundamentalism elsewhere.

Given all this, why are so many CEOs and Wall Street bankers enthusiastic about Bush? One investment banker with Democratic leanings offered me the only explanation he could think of. "It's greed," he said, simply. "They love the tax cuts. They just want to keep more of their money." And what of all the long-term dangers I've enumerated? "They don't think long-term," was his snap response.

The Clinton years were far better for big business than the Bush term. But again, ideology trumps all.

But not even this explanation seems totally convincing. After all, America's tycoons did far better under Bill Clinton than they've done under George II. Their salaries soared and stock options ballooned. The end wasn't fun, of course, but that was because the market had reached unsustainable heights. But during the Clinton years, stocks still tripled in value. After four years of George W. Bush, the Dow has barely moved. A rationally self-interested greedy bastard who never thought about the future would far prefer the Clinton years to another four years of Bush, even with Bush's tax cuts. John Kerry promises to continue Clinton's economic policies, so the greedy bastard should line up behind Kerry.

The answer has more to do with ideology than with rational thought. The Bush administration is filled with CEOs who speak the language of big business. They're at home with spreadsheets and PowerPoint presentations. They make "hard" decisions. They stick to their guns. The deficit may be out of control, the world may have turned against us, right-wing religious fanatics may be beating at their doors, their own stock portfolios may be disappointing. But their friends are in the White House, and, it seems, that's all they really care about. ■

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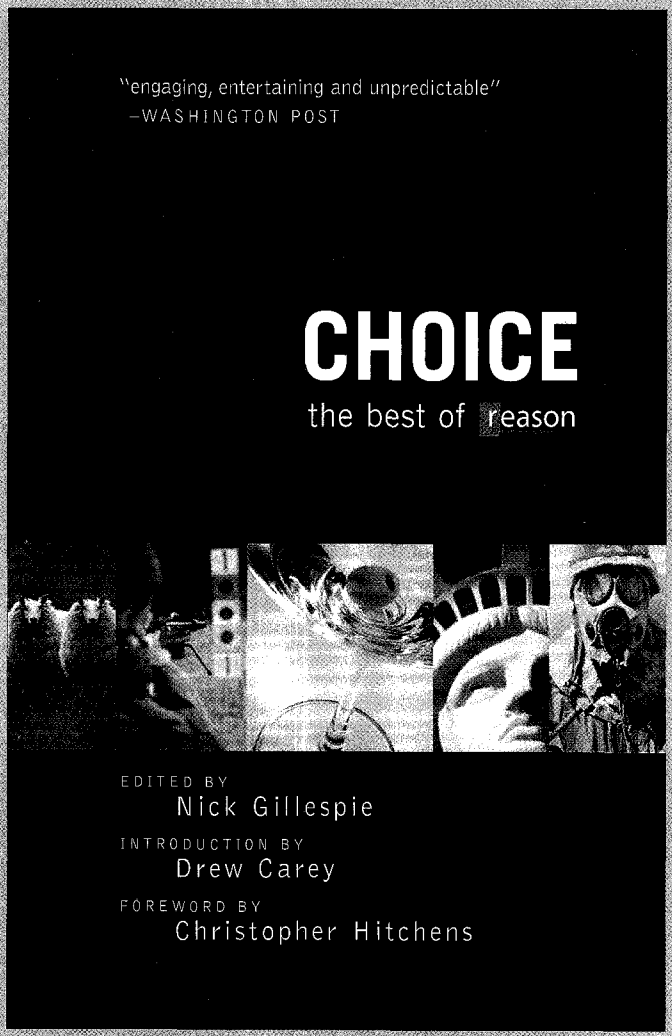

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